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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

ABRAHAM FISHGOLD,
Plaintiff-Respondent,

against

SULLIVAN DRYDOCK & REPAIR CORPORATION,
Defendant,

ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor-Appellant.

Statement Under Rule 13.

This action was commenced by the service of the summons and complaint on defendant on or about July 6, 1945. Defendant served an answer on or about July 30, 1945. The intervener served an answer to the complaint on or about August 20, 1945.

The hearings were held before Hon. Matthew T. Abruzzo on August 20 and 29, 1945, at the conclusion of which a decision was rendered in favor of plaintiff.

The plaintiff was represented by Knowlton Durham. The defendant was represented by J. Read Smith. The intervener union was represented by M. H. Goldstein and Mr. Rosenfeld.

There has been no change of parties or attorneys herein.

4

Summons.

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD, Plaintiff, v. SULLIVAN DRYDOCK & REPAIR CORPORATION, Defendant.	Civil Action File No. 5700

5 *To the above named Defendant:*

You are hereby summoned and required to serve upon Knowlton Durham, plaintiff's attorney, whose address is 70 Pine Street, Borough of Manhattan, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

PERCY G. B. GILKES,
Clerk of Court.

By NAN V. MCNABB,
Deputy Clerk.

6

Date: July 6, 1945.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Complaint.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD, Plaintiff, against SULLIVAN DRYDOCK & REPAIR CORPORATION, Defendant.	C-5700

ACTION UNDER SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, AND THE APPLICABLE SUBDIVISIONS THEREOF, TO SUE WITHOUT TAXATION OF FEES OR COURT COSTS FOR THE ENFORCEMENT OF THE LAWS OF THE UNITED STATES FOR THE BENEFIT OF PERSONS INDUCTED INTO THE LAND OR NAVAL FORCES FOR TRAINING AND SERVICE

Plaintiff, by Knowlton Durham, his attorney, complaining of the defendant, alleges:

FOR A FIRST CAUSE OF ACTION:

FIRST: That at all the times hereinafter mentioned the plaintiff was and still is a resident of the Borough of Brooklyn, the City and State of New York.

SECOND: Upon information and belief, that at all the times hereinafter mentioned the defendant was and still is a domestic corporation organized and existing under and by virtue of the Laws of the State of New York.

THIRD: Upon information and belief, that at all the times hereinafter mentioned the defendant was and still

is engaged in the business of constructing and repairing naval and other vessels of various types at its shipyard at the Foot of 23rd Street, Borough of Brooklyn, City and State of New York.

FOURTH: That, prior to the 22nd day of May, 1943, plaintiff was employed by the defendant as a welder in a position other than temporary, at its said plant in the Borough of Brooklyn.

FIFTH: That on or about the 22nd day of May, 1943, plaintiff was inducted into the land forces of the United States, under the provisions of The Selective Training and
11 Service Act of 1940, as Amended, for training and service, and on or about said day, in order to perform such training and service, he left his position of employment with said defendant.

SIXTH: That thereafter plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which date he was honorably discharged therefrom with a certificate that he had satisfactorily completed his period of training and service.

SEVENTH: That within forty (40) days after his discharge from the Army of the United States, as aforesaid, and on or before the 21st day of August, 1944, plaintiff
12 applied to the defendant for reinstatement in his former employment with the defendant and that at the time of making such application the plaintiff was qualified to perform the duties of the position he had formerly occupied.

EIGHTH: That on or about the 25th day of August, 1944, defendant restored plaintiff to his former position, but thereafter and from time to time, the defendant without cause and contrary to the provisions of The Selective

Training and Service Act of 1940, as Amended, "laid off" the plaintiff from such employment and refused to permit him to work in its employment on the following days, viz.: April 9, 10 and 11; May 17, 18, 19, 20, 21, 22, 23 and 24, 1945, and that on each of such days the plaintiff's wages had he been employed by the defendant would have amounted to a minimum of $9.60 for eight (8) hours of work.

NINTH: Upon information and belief that on each of the days when the plaintiff was "laid off", as aforesaid, the defendant's plant was in operation and other employees, possessing the same or comparable skill and experience as the plaintiff, were continued at work by the defendant.

TENTH: That the act of defendant in "laying off" the plaintiff from time to time, as aforesaid, constituted a violation of the provisions of Section 8 of The Selective Training and Service Act of 1940, as Amended, and by reason of the premises plaintiff was deprived of the rights guaranteed him by said Section 8 of the Act, and has suffered and will continue to suffer loss of his position and of his wages and of the benefits granted to him by said Act.

FOR A SECOND CAUSE OF ACTION:

ELEVENTH: Plaintiff repeats and re-alleges each and all of the allegations set forth in paragraphs "First" to "Tenth", inclusive, with the same force and effect as if set forth in full herein, and further alleges:

TWELFTH: That, pursuant to the provisions of Section 8 of The Selective Training and Service Act of 1940, as Amended, plaintiff was entitled to be restored to his former employment and to be continued therein without discharge or "lay-off" without cause for a period of one year from

the date of his reinstatement nor could he be discharged therefrom or temporarily "laid off" so long as the defendant's operations required the employment of employees holding positions similar or comparable to that of the plaintiff.

THIRTEENTH: Upon information and belief, that the cause of the plaintiff's being "laid off" from work in his restored employment was due to protests made to the defendant by Brooklyn Local No. 13 of the Industrial Union of Marine & Shipbuilding Workers of America contending that, when there was not sufficient work at the
17 plant to occupy all of the defendant's employees, plaintiff should be "laid off" by the defendant before it should "lay off" employees with greater union seniority and tenure of service.

FOURTEENTH: That the plaintiff protested to the defendant against being "laid off" by the defendant, but the defendant continued and still continues to "lay off" the plaintiff from time to time when there is not sufficient work to occupy all of the employees of the defendant holding positions similar or comparable to that of the plaintiff.

FIFTEENTH: That the protest made by Brooklyn Local No. 13 of the Industrial Union of Marine & Shipbuilding Workers of America, as aforesaid, did not constitute
18 "cause" under the provisions of said Act for the plaintiff's being "laid off" by the defendant and being denied work by it from time to time, as aforesaid, nor did it justify the defendant in its actions with respect to the plaintiff.

SIXTEENTH: All and singular the premises are true and within the jurisdiction of the United States under the provisions of The Selective Service and Training Act of 1940, as Amended, and of this Honorable Court.

WHEREFORE, plaintiff demands judgment against the defendant:

(1) for the sum of $115.60 by reason of the loss of wages sustained by the plaintiff by reason of the defendant's unlawful acts, as aforesaid; and

(2) for a declaratory judgment that the defendant be specifically required under the provisions of Section 8 of The Selective Training and Service Act of 1940, As Amended, to continue the plaintiff in its steady employment for the period of one year from the 25th day of August, 1944, so long as defendant's operations necessitate the employment of employees holding positions similar or comparable to that of the plaintiff;

(3) for a declaratory judgment that the protests filed by Brooklyn Local No. 13 of the Industrial Union of Marine & Shipbuilding Workers of America, as aforesaid, do not constitute just cause under the provisions of said Act for "laying off" the plaintiff from his former position or from one of like seniority, status and pay; and

(4) for such other, further and different relief as to this Court may seem just, together with the costs and disbursement of this action.

KNOWLTON DURHAM,
Attorney for Plaintiff,
Office & P. O. Address,
No. 70 Pine Street,
Borough of Manhattan,
New York, N. Y.

(Verified July 5, 1945.)

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Answer of Defendant.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, by J. Read Smith, its Attorney, answering the Complaint of the plaintiff herein:

AS TO THE FIRST CAUSE OF ACTION

FIRST: Admits the allegations contained in paragraphs marked "Second" and "Third".

23

SECOND: Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in paragraphs of the Complaint marked "First", "Fifth", "Sixth" and "Seventh".

THIRD: Denies the allegations contained in paragraph of the Complaint marked "Fourth", except it admits that prior to the 22nd day of May, 1943, plaintiff was employed by the defendant as a Welder at its plant in the Borough of Brooklyn.

FOURTH: Denies the allegations contained in paragraph of the Complaint marked "Eighth", except it admits that on
24 or about the 25th day of August, 1944, defendant restored plaintiff to his former position.

FIFTH: Denies the allegations contained in paragraphs of the Complaint marked "Ninth" and "Tenth".

AS TO THE SECOND CAUSE OF ACTION.

SIXTH: In respect to paragraph of the Complaint marked "Eleventh", the defendant realleges the allegations of para-

graphs "First" to "Fifth", inclusive, hereof with the same force and effect as if the paragraphs were repeated at length.

SEVENTH: Denies the allegations contained in paragraphs of the Complaint marked "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth" and "Sixteenth", except that the defendant admits that the premises are within the jurisdiction of the United States under the provisions of the Selective Training and Service Act of 1940, as Amended, and of this Honorable Court.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO THE ALLEGED CAUSES OF ACTION STATED IN THE COMPLAINT.

EIGHTH: That on or about the 20th day of February, 1942, Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, was certified by the National Labor Relations Board as the bargaining agent for the majority of the defendant's employees, including Welders.

NINTH: That pursuant to said certification, defendant was obliged to and did enter into a Labor Agreement with said Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America.

TENTH: That the said Agreement contained the following provision:

"MILITARY SERVICE

Any employee other than a probationary employee who volunteers for or is drafted into the Naval or Military service of the United States, shall retain his length of service standing and shall have the time spent by him in such service count towards his length

of service standing; the employee so volunteering or drafted must give the Company notice in writing of his intention to so leave his employment; any such employee who within forty (40) days of release or discharge from said service applies for re-employment shall be re-hired provided he is fit for duty and work is available. The availability of work will be determined according to length of service and ability. If re-employed, said employee shall receive the then current rate of pay for the job for which he is re-employed."

ELEVENTH: That on or about the 17th day of May, 1944, a new Contract was entered into between the defendant and Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America containing the following provision:

"MILITARY SERVICE

Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee, who within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee

shall then receive the then current rate of pay for the job for which he is re-employed."

That said clause was in effect and operation on or about August 25th, 1944 and is still in effect and operation.

TWELFTH: That on or about August 25th, 1944, said Labor Agreement contained and at the present time does contain the following provision:

"Should any difference arise between the Company and the Union with respect to any grievance or with respect to the meaning or the application of any of the provisions of this Agreement, they shall be disposed of between the parties hereto and an earnest attempt shall be made to settle such differences within a reasonable time as hereinafter provided.

In the event that a dispute shall not have been settled satisfactorily between the Union and the Company, said dispute shall be submitted to arbitration. If, within five (5) days after the date of the decision of the Company with which the Union disagrees, The Company and the Union cannot agree upon an Arbitrator, the National War Labor Board shall be asked to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters to be arbitrated under the within contract shall be limited to the interpretation and application of the said Contract."

THIRTEENTH: That on or about August 25th, 1944, the aforesaid Contract contained and at the present time does contain the following clause:

"Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

FOURTEENTH: That on or about August 25th, 1944, defendant restored the plaintiff to his former position and employ and the plaintiff has since that date been and still is employed by the defendant although from time to time between August 25th, 1944 and the present date, due to the exigencies of production and the periodic "drop-off" of available work, plaintiff has been "shaped-up", pursuant to the provisions of the aforesaid Labor Agreement.

FIFTEENTH: That on or about March 31st, 1945, the plaintiff herein was permitted to work in the defendant's plant, although its employee, G. Jackerson, was "shaped-up".

SIXTEENTH: That on or about March 31st, 1945, the said G. Jackerson had greater length of service with the defendant than the plaintiff had at that time.

SEVENTEENTH: That on or about April 2nd, 1945, Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, filed a written grievance with the defendant, pursuant to the terms of the aforesaid Labor Agreement; said "grievance", in effect, protested the action of the defendant in the "shaping-up" of the said G. Jackerson and the permitting of the plaintiff to work in his stead.

EIGHTEENTH: The defendant decided the "grievance" in favor of the plaintiff and the matter was thereafter submitted to an Arbitrator, appointed by the National War Labor Board.

NINETEENTH: The aforesaid Arbitrator rendered his decision and opinion, a copy of which is annexed hereto and made a part hereof.

TWENTIETH: That neither the Selective Training and Service Act of 1940, as Amended, nor the Labor Agreement required the defendant to keep the plaintiff at work if it necessitated the "laying-off" or "shaping-up" of an employee with greater seniority or length of service with the defendant.

WHEREFORE, the defendant demands judgment that the Complaint be dismissed and for such other further and different relief as to this Court may seem just and proper.

J. READ SMITH,
Attorney for Defendant,
Office and P. O. Address,
44 Court Street,
Borough of Brooklyn, N. Y.

Exhibit Annexed to Answer of Defendant.

In the Matter of Arbitration between SULLIVAN DRY DOCK & REPAIR CORP. (Brookyn, N. Y.) and INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O., LOCAL 13.	Re: Seniority of returning veteran named Abraham Fishgold.

STATEMENT OF CASE AND OPINION OF ARBITRATOR.

I

This case involves a demand of the Union that Abraham Fishgold, a reemployed veteran, shall not be given sen-

iority rights in excess of those accumulated during his term of employment with the Company plus the time he spent in the Army. It is the position of the Company that to grant such a request would be contrary to instructions received from the Director of Selective Service, New York City Headquarters. Pursuant to the method provided in the contract for the naming of an arbitrator, the undersigned was appointed by the National War Labor Board to act as arbitrator for the parties in this dispute. The issue involved is as follows:

> "Whether or not G. Jackerson (a non-veteran) was properly shaped-up on March 31, 1945 to provide work
41 for Abraham Fishgold (a discharged veteran), as provided by Articles IV and VIII of the existing agreement between the parties."

By "shape-up" is meant the process whereby employees are daily engaged for work or laid off in accordance with the amount of work available at a particular time. Other factors being equal, seniority determines which men are to assume work duties or to be laid off on a given day.

Both Jackerson and Fishgold progressed from lower rated jobs to the rating of 1st Class Mechanics, and as welders are substantially equal in ability. Jackerson has been in the employ of the Company since November 25, 1942. Fishgold started work at the plant on December
42 21, 1942, entered the United States Army on June 5, 1943, and following his military discharge was reemployed by the Company on August 25, 1944 with full seniority credit for the time he spent in the service. Upon being shaped-up in favor of Jackerson early in March 1945, Fishgold made complaint to the local Selective Service Headquarters. Acting upon advice from that Office that veterans are entitled to super-seniority, Fishgold was given precedence over Jackerson in the shape-up on March 31, 1945. It is

on the basis of such incident that the case herein developed.

II

Article IV, Section 6 of the agreement between the parties provides that:

> "* * * decreases in the working force shall be based upon length of service and ability to do the job. Whenever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

Article VIII of the agreement reads:

> "Any employee * * * who is drafted or volunteers 44
> for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as though he were actually and continuously employed by the Company * * *. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the 45
> job, for which he is re-employed."

In accordance with contract procedure, Jackerson, the non-veteran, was entitled to preference in the shape-up on March 31, 1945. The Company was prompted to act contrary to such procedure only on the basis of instructions in three letters sent by the Director of Selective Service. The final letter of March 31, 1945 made more specific

the points discussed in the two previous letters and reads, in part, as follows:

"In the case of the above named veteran, it appears that he was laid-off under a so-called 'shape-up' because, from time to time, there was not enough work to go around for all the employees and that non-veterans with greater union seniority than he had and were doing exactly the same kind of work that he was, were kept at work on the 'shape-up'.

"It is the position of Selective Service System that a veteran who has been reinstated in employment may not be laid off or denied the right to work if there is
47 work to be done which he is capable of doing. In other words, under a 'shape-up' or any other similar practice, if there is *some* work available for *some* men, the veteran must be kept at work even though this may necessitate laying off non-veterans with greater union seniority."

III

Such a ruling is in direct conflict with the above provisions of the collective bargaining agreement and in order to supersede them must find valid support in law. The legal basis for protection of reemployment rights to veterans is the Selective Training and Service Act of 1940, as Amended (hereinafter referred to as the Act). Rele-
48 vant portions of Section 8 of that Act are as follows:

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon completion of such period of training and service * * *.

"(b) In the case of any such person who, in order to perform such training and service has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have no changed as to make it impossible or unreasonable to do so;

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (B) of subsection (b) shall be considered as having been on furlough or leave of absence during the period of training and service in the land or naval forces, shall be restored without loss of seniority, shall be entitled to participate in insurance and other benefits * * * and shall not be discharged from such position without cause within one year after such restoration."

According to the context of the provisions of the above act, the maximum obligations of the Company to the returning veteran are: That he shall be rehired upon proper application and showing of certificate; that he shall suffer no loss in his status as employee as a result of his absence from the plant to participate in the armed forces; and that he shall be retained in the employ of the Company, with all his rights secured, for the period of one year.

Each of these requirements has thus far been strictly fulfilled. Fishgold has been reinstated and maintained in employment with accumulated seniority and enjoyment of benefits other employees might have gained during the period of time he spent in the service. There remains but one question as an issue in dispute; whether, under the provisions of the Act, the Company is required to go a step further and grant top seniority to veterans in the matter of lay offs.

In this respect it is found that the Act, in defining rules of conduct, makes no reference by express or implied language that a veteran shall be given super-seniority. Nor
53 is it believed that such a right could have been intended. The purpose of the Act, as clearly stated by its provisions, was designed to preserve inviolate the job status of the returning veteran as though his participation in the military service had caused no break in the continuity of employment; not to assure him of perquisites, the bestowal of which might entail far reaching implications. For the application of such super-seniority rights to lay offs would not only tend to disrupt the organization of a plant during the reconversion period by denying it the use of more highly experienced personnel; deprive non-veterans of rights after they had been earned and separate them from jobs they had reason to consider as their own; arouse antagonism between two groups of employees; but of equal importance, it would be contrary to our traditions of de-
54 mocracy and especially to a higher important value in our society—our sense of fair play. Considering these possible consequences and the conflict which would arise if seniority as between veterans were graded on the basis of the date they returned to the plant, the adoption of the practice of super-seniority would also result to the disadvantage of veterans. Moreover, though it cannot be denied that consideration is due the veterans as a just reward

for their service and sacrifice, it is not believed that more of them expect or would desire to become such a preferred class of job holders.

Since it is found that the agreement which provides for the shape-up in accordance with seniority is not invalidated by the Act, neither by its language or possible intent, the agreement should govern the relations between the parties in this matter unless there exists some other factor which can be deemed controlling.

IV

On May 5, 1944, National Headquarters of the Selective Service System issued Memorandum No. 190-A, entitled 56
"Reemployment Policies". Part IV, Section 4(b), which relates to the instant dispute reads:

> "A veteran who has been reinstated to his former position cannot be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his reemployment rights under the Act, and would be, in effect, a repeal of an Act of Congress."

It is apparently that provision in the Memorandum which acted as a basis for the ruling by Selective Service System in its letter of March 31, 1945 to the Company.

This Memorandum, as stated in its first paragraph, sets 57
forth policies adopted by National Headquarters "for the guidance of all members of Selective Service System who are charged with carrying out its Veteran's Assistance Program". As such, the Memorandum represents views regarding application of the provisions of the Act, and is not deemed as having foundation in law. Though under broad rules of liberal construction, reasonable doubts might be resolved in favor of the Act, nevertheless, the position

taken in the Memorandum with regard to layoffs is of such a nature as to go beyond the realm of interpretation and to add, in effect, a significant reemployment provision to the Act. Such power is not conferred on the Selective Service System by the statute. To the contrary, aside from its important functions in rendering assistance to ex-service men as permitted under the Act, paragraph (e), Section 8 of that act otherwise limits the administrative authority of the Selective Service System with regard to the procedure that is to be used in carrying out the reemployment provision, to the extent that enforcement duties are delegated to other agencies.

59 Finally, as for the last statement in Part IV, Section 4(b) of the Memorandum, it is difficult to accept the view that a veteran, in the absence of top seniority as to lay offs would actually be deprived of all his reemployment rights under the Act. The acceptance of such a viewpoint would imply that intermediate aspects of a condition can be satisfied only if the extreme of that condition is achieved; or more specifically, that unless protection as to reemployment is assured in its ultimate aspect, no degree of protection can benefit the veteran. Such an absolute approach overlooks the fact that the scope of a right consists of a series of steps, and while successive ones progress in intensity, each step in the scale, nevertheless, constitutes a right in itself. In the instant matter, the veteran's right to reemployment was fixed at a certain point by the Act:
60 to protect him against loss of job-status for the period of time spent in military service. It can hardly be denied that such protection is of inestimable value to those veterans formerly job holders.

V

The decision that the shape-up should be determined on the basis of seniority, as provided for in the agreement,

rests upon the finding that the Act does not, expressly or by implication, prevent such a practice or give support to Section 4(b) of Part IV contained in Memorandum No. 190-A.

The appropriate award in conformity with the conclusion reached in this opinion is attached herewith.

Dated: May 4, 1945.

/s/ FRANK HARRIS
Frank Harris
Arbitrator

In the Matter of Arbitration
between
SULLIVAN DRY DOCK & REPAIR CORP.
and
INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O.; LOCAL 13.

Re: Seniority of returning veteran named Abraham Fishgold.

AWARD

The decision of the Arbitrator is that: 63

Pursuant to Articles IV and VIII of the existing agreement between the parties, G. Jackerson, a non-veteran, should not have been paid off in the shape-up on March 31, 1945 in order to provide work for Abraham Fishgold, a discharged veteran.

Dated May 4, 1945.

/s/ FRANK HARRIS
Frank Harris
Arbitrator

64

Answer of Intervener.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK:

ABRAHAM FISHGOLD, Plaintiff, against SULLIVAN DRY DOCK & REPAIR CORP., Defendant,	C-5700.
65 ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members, Intervener.	

The intervener, by William L. Standard, his attorney, in answer to the allegations of the complaint, alleges:

AS TO THE FIRST CAUSE OF ACTION

1. Denies any knowledge or information sufficient to form a belief with respect to the allegations of paragraphs "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" and
66 "Ninth" of the complaint.

2. Denies each and every allegation of paragraph "Tenth" of the complaint.

AS TO THE SECOND CAUSE OF ACTION

3. Repeats, reiterates and realleges with respect to the allegations of paragraph "Eleventh" of the complaint, the allegations of paragraphs "1" and "2" of the answer herein.

4. Denies each and every allegation contained in paragraphs "Twelfth", "Thirteenth" "Fourteenth", "Fifteenth" and "Sixteenth" of the complaint.

AS AND FOR A FIRST COMPLETE SEPARATE AND AFFIRMATIVE DEFENSE, THE INTERVENER ALLEGES:

5. That the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. is a trade union composed of a large number of local affiliated unions whose members are employed in the shipbuilding and repair industry throughout the United States and that John Green is the president thereof.

6. That Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. is a trade union affiliated with the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. and is subject to the authority of the Constitution and by-laws thereof.

7. That during or about the month of January, 1945, the General Executive Board of the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. pursuant to the authority conferred upon it by the Constitution and by-laws assumed full control over the property and affairs of Local 13, including its collective bargaining agreements, and appointed Roy Granata as Administrator with full power to act as President and Treasurer of said Local 13 and that the said Roy Granata assumed said offices and is now exercising the functions thereof.

8. That on or about the 20th day of February, 1942, and pursuant to the provisions of the National Labor Relations Act, the National Labor Relations Board certified Local 13 as the sole and exclusive bargaining agent for the production and maintenance employees of the defend-

ant, Sullivan Dry Dock and Repair Corp. including the employees of the welding department of said defendant.

9. That thereupon, and in accordance with the provisions of the National Labor Relations Act; the defendant recognized Local 13 as such sole and exclusive bargaining agent and on or about April 6th, 1942 entered into a collective agreement, has, from time to time, been modified and as modified, been extended, and the agreement as modified and extended is presently in full force and effect and was in full force and effect at all times mentioned in paragraphs "Fourth", "Fifth" and "Eighth" of the complaint.

71 10. That by virtue of its assumption of control over the property and affairs, including the collective agreement with the defendant, Sullivan Dry Dock and Repair Corp., of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. has succeeded to all the rights and privileges enjoyed by Local 13 under said agreement.

11. That said agreement, a copy of which is annexed hereto, includes, and at all times mentioned in paragraphs "Fourth", "Fifth" and "Eighth" of the complaint also included, among others, a provision that tenure of employment is governed by seniority and that all reductions and 72 increases in the working force shall be in accordance with the length of employment.

12. That said agreement includes and at all times mentioned in paragraphs "Fourth", "Fifth" and "Eighth" of the complaint also included a further provision to the effect that any employee of the defendant entering the armed forces shall retain his seniority standing and that upon his return to employment shall receive the same seniority standing as if he had remained continuously employed.

13. That said provisions of the collective bargaining agreement are consistent with the Selective Service and Training Act of 1940 as amended and afforded to plaintiff all the rights granted by the provisions of said Act.

14. That plaintiff, upon his discharge from the armed forces, was re-employed and credited with seniority as of the date of his first employment with the defendant in accordance with the provisions of said agreement and the provisions of the Selective Service and Training Act of 1940, and that he had not been laid off or discharged in violation either of the provisions of said collective agreement or of any of the provisions of said act. 74

AS AND FOR A SECOND COMPLETE SEPARATE AND AFFIRMATIVE DEFENSE, THE INTERVENER ALLEGES:

15. Repeats, reiterates and realleges each and every allegation of the First Complete Separate and Affirmative Defense herein in paragraphs numbered "5", "6", "7", "8", "9", "10", "11", "12", "13" and "14".

16. That the defendant, Sullivan Dry Dock and Repair Corp. operates a ship repair yard and it is the customary practice for its working force to fluctuate from day to day in accordance with the number of vessels delivered to said defendant for repairs.

17. That said day to day reductions and increases in the working force is accomplished by means of the "shape up" system whereby employees are put to work as needed when work is available, in accordance with the seniority provisions of the collective agreement.

18. That said employees who are "shaped up" remain employees and are not considered as discharged or "laid off".

76 *Answer of Intervener.*

19. That at none of the times mentioned in the complaint and at no other time, was plaintiff laid off or discharged but he was, from time to time "shaped up" in accordance with seniority and without losing his status as an employee of the defendant.

AS AND FOR A THIRD COMPLETE SEPARATE AND AFFIRMATIVE DEFENSE, THE INTERVENER ALLEGES:

20. Repeat, reiterate and reallege each and every allegation of the First and Second Complete Separate and Affirmative Defenses herein in paragraphs numbered "5",
77 "6", "7", "8", "9", "10", "11", "13", "14", "15", "16", "17", "18" and "19".

21. That at none of the times set forth in paragraph "Eighth" of the complaint, was the plaintiff laid off or discharged without cause.

WHEREFORE, the intervener prays for a judgment dismissing the complaint herein, together with costs, and for such other and further relief as to this Court may seem just and proper.

WILLIAM L. STANDARD,
Attorney for Intervener,
Office & P. O. Address,
78 291 Broadway,
Borough of Manhattan,
City of New York.

M. H. GOLDSTEIN,
Of Counsel,
1420 Walnut Street,
Philadelphia, Pa.

79

Exhibit Annexed to Answer of Intervener.

AGREEMENT between the SULLIVAN DRY DOCK & REPAIR CORPORATION, or its successors or assignees and LOCAL 13 of the INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, affiliated with the Congress of Industrial Organizations.

This AGREEMENT executed this 17th day of May, 1944, between the SULLIVAN DRY DOCK & REPAIR CORPORATION, hereinafter referred to as the "Company", and LOCAL 13 of the INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, hereinafter referred to as the "Union",

80

WITNESSETH:

WHEREAS, the United States of America is engaged in a bitter struggle for its very existence and the cooperation of labor and industry is vitally needed to win the war,

NOW, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter arrived at, the parties hereto make the following agreement:

ARTICLE I

RECOGNITION

SECTION 1. The Company recognized the Union as the sole and exclusive bargaining agent for all its production and maintenance employees, including watchmen and guards, excluding electricians, their helpers and snappers; excluding foremen, sub-foremen, supervisors, timekeepers and any one in an official capacity on a salary basis, draftsmen and office employees as provided for by the National Labor Relations Board supplemental decisions and certifications of representatives dated February 20, 1942 and April 20, 1942.

81

82 *Exhibit—Agreement between Defendant and Local 13.*

(a) All employees who have been properly listed as members of the Union in good standing at any time since March 1, 1943 and who are members of the Union in accordance with its constitution and by-laws on March 10, 1944, shall as a condition of employment, maintain their membership in the Union in good standing for the duration of the collective bargaining agreement in which the provision is incorporated, or until further order of the Commission unless they resign in writing from the Union during the period beginning February 26, 1944 and ending March 12, 1944.

As a condition of resignation, unpaid initiation fees and
83 Union dues, due up to February 26, 1944, shall be paid at the time of resignation, or satisfactory arrangements made with the Union to accomplish this purpose.

The Union shall, immediately after the aforesaid date, furnish the National War Labor Board with a notarized list of its members in good standing as of that date.

The Union, its officers and members shall not intimidate or coerce employees into joining the Union or continuing their membership therein.

(b) If a dispute arises as to whether an employee (1) was a member of the Union of the date specified above or (2) was intimidated or coerced during the fifteen-day "escape period" into joining the Union or continuing his membership therein, such dispute may be submitted for
84 determination by an arbitrator to be appointed by the National War Labor Board. The decision of the arbitrator shall be final and binding upon the parties.

(c) If a dispute arises as to whether an employee (1) has failed to maintain his membership in the Union in good standing after the aforesaid date; or (2) was intimidated or coerced into joining the Union after the aforesaid date, such dispute may be submitted for determination by an arbitrator to be selected in the manner provided by the

contract of the parties, or if no such provisions exist, to be selected by special agreement. In the absence of such a contract provision or special agreement, the arbitrator will be selected by the National War Labor Board on due application. The decision of the arbitrator shall be final and binding upon the parties.

(d) Any party desiring to post or otherwise publish an official explanation by the National War Labor Board of the foregoing maintenance of membership provision may use the attached form of notice. A statement of the procedure to be followed in administering the maintenance of membership provision, the absence of some other procedure agreed to by the parties is also attached. 86

ARTICLE II

Check Off of Dues

The Company will deduct from the pay of each employee who is a member of the Union, initiation fees and each month the sum of One Dollar and Twenty-five cents ($1.25) as Union dues, and will transmit all monies so deducted to the appropriate Local of the Industrial Union of Marine and Shipbuilding Workers of America, before the end of said month and the Union will issue to the Company its official receipt therefor.

The Check-Off system shall commence with one month's deductions during the month following submission of membership lists by the Union. All arrangements as to details of effectuating the system shall be negotiated by the parties. 87

88 *Exhibit—Agreement between Defendant and Local 13.*

ARTICLE III

Discrimination—No Strike or Lockout—Functions of Management—Union Activity

Section 1. The Company agrees that neither it nor its officers, foremen or supervisors will discriminate against any employee included in this Agreement because of membership in or activity on behalf of the Union.

Section 2. There shall be no lock-out of any kind by the Company and there shall be no walk-out or sit-down strike or any cessation of work or restriction of work of
89 any kind or for any cause or on account of any controversy whatsoever by the Union or any of the members thereof who are or shall be employees of the Company during the term of this Agreement.

Section 3. Nothing in this Agreement shall be deemed to limit or restrict the Company in anyway in the exercise of the customary functions of management including the right to make such rules not inconsistent with the terms of this Agreement relating to its operation as shall be deemed advisable, and the right to hire, suspend, discharge or otherwise discipline any employee for violations of such rules or other proper cause.

Section 4. Shop Stewards shall be permitted to exer-
90 cise their function as such in cases of discharge or suspension cases or any emergency case arising under the contract on company time and on plant property as long as there is no interference with production. The Union shall be permitted to place notices of Union meetings on bulletin board provided by the Company.

ARTICLE IV

SENIORITY

SECTION 1. The following departments shall be recognized in the yard: Hull, Welding, Pipefitting, Rigging, Burning, Inside Machinists, Outside Machinists, Blacksmiths, Carpenters, Joiners, Wood Caulkers, Laborers and Fire Watchers.

SECTION 2. The Company shall prepare and post for each such department a list showing the length of service of each employee according to his trade classification within the department. Such lists shall be arranged in order 92
of service and copies shall be furnished the Union.

Any employee may protest in writing his length of service as posted by the plant, provided he does so within two weeks after his name is posted in the list. Such protest shall be handled as any other grievance.

SECTION 3. Employees shall lose all seniority rights if:

(a) They terminate their services voluntarily when needed.

(b) They are discharged for proper and sufficient cause.

(c) They do not report for work when notified unless within three days they present a reasonable excuse.

(d) They do not work for the plant for three (3) months 93
(consecutive) unless absence is due to illness or injury (as evidenced by a proper medical certificate), or unless leave-of-absence has been granted.

SECTION 4. An employee in one classification when temporarily transferred to another department due to lack of work in his own department, shall have his name placed at the bottom of the temporary department's list, but shall

retain his standing in his own department when rehiring takes place.

No employee shall be transferred to a department when such transfer will prevent the return to work of an available and competent employee of that department (his relative competency in each instance to be determined by the respective Foreman) or cause the lay-off of any employee in that department.

SECTION 5. Shop Stewards shall, for the term of their elective office, have top seniority rights in their respective departments.

95

SECTION 6. Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor.

SECTION 7. All available work and/or overtime in a craft or classification shall be divided equally within reason, among all employees of said craft or classification.

SECTION 8. The Union shall be permitted to maintain no more than one Shop Steward for each department. A Shop Steward shall retain the top seniority position so long as he remains Shop Steward and upon relinquishing his office
96 as Shop Steward, he shall return to his regular seniority standing.

SECTION 9. The Company agrees to grant reasonable leaves of absence or reasonable periods of time off to any employee who shall be appointed or elected to office by the Union or who shall be assigned by the Union to do Union work. Such employees shall retain their seniority standing, and leaves of absence or periods of time off as the

case may be, shall be counted toward their seniority of such employees as if they were actually and continuously employed by the Company. No leave of absence of period of time off, however, shall extend beyond one year and ten days. The Foreman shall be notified in advance of such leave.

SECTION 10. Each employee shall receive two hours pay for shaping up when called in and not put to work.

ARTICLE V

WORK WEEK AND OVERTIME RATES 98

SECTION 1. The regular work week shall consist of forty hours, five days, at eight hours each, Monday to Friday inclusive. All work performed in excess of hours other than those of the employees' regular eight hours shift, shall be compensated at the rate of one and one-half times the established hourly base rate.

SECTION 2. A regular shift shall be considered to be an eight hour day period, exclusive of lunch period.

SECTION 3. All work to be performed on Saturday shall be paid for at the rate of time and one-half the regular hourly rate. All work performed on Sundays and the following holidays: New Year's Day, Independence Day, 99
Labor Day, Columbus Day, Washington's Birthday, Lincoln's Birthday, Armistice Day, Election Day, Memorial Day, Thanksgiving Day and Christmas Day, shall be paid at the rate of double time.

In the event that the provisions thereof conflicts with those of the provisions of the Atlantic Coast Zone Standards Agreement, then the provisions of the Atlantic Coast Zone Standard Agreement shall prevail.

100 *Exhibit—Agreement between Defendant and Local 13.*

SECTION 4. Overtime pay shall be paid for all work performed before regular starting time and after regular quitting time of the shift to which the employee is regularly assigned. When employees work for a continuous period of twenty-four hours, their overtime pay shall continue until such time as they are relieved from work for a period of at least ten hours.

SECTION 5. All shift hours shall be determined by the Company after discussion with representatives of the Union.

101 SECTION 6. All employees working on the night shift shall receive a bonus of 7% over day rates for all hours of work.

ARTICLE VI

VACATIONS

SECTION 1. All employees who have been employed by the Company for a total of 1570 straight time hours during the period of one year from the anniversary date of employment, shall receive one week's vacation with pay. Those employees who have been so employed by the Company for five or more years, shall receive two week's vacation with pay.

102 SECTION 2. The number of hours for which an employee shall be paid for a vacation week shall be the average number of hours worked per week during the ten pay periods immediately preceding the beginning of his vacation, with a minimum allowance of 40 hours and a maximum allowance of 48 hours. Vacation pay shall be calculated on the basis of the employee's base rate of pay at the time the vacation is taken or the payment in lieu thereof made.

SECTION 3. Any employee who is separated after he has qualified for a vacation shall be paid in cash for the number of days vacation allowance due him as provided under the provisions of Section 1 of this Article.

SECTION 4. Time lost through injury occurring while working for the Company shall not be deducted in computing time hours worked towards vacation.

SECTION 5. The employees who claim vacations under the provisions of this Article shall notify the Company on forms to be provided by the Company. The Company reserves the right to permit an employee to take vacation in accordance with its operational requirements or convenience. 104 The actual date when vacation is taken shall not effect the time when the employee is entitled to his next vacation, but the eligibility of each employee for his vacation pursuant to this Article, shall be determined on the basis of the anniversary date of his employment.

ARTICLE VII

WAGE SCALE—DIRTY WORK—PENALTY PAY—UPGRADING AND PROMOTIONS—APPRENTICES

SECTION 1. The following shall be the rates of pay for the duration of this Agreement, except as hereinafter provided: 105

Snappers	$1.30 per hour
Temporary Snapper	1.30 " "
Mechanics First Class	1.20 " "
Improvers—3 months—third class (with tools)	1.00 " "
Improvers—9 months—second class	1.09 " "
Improvers—15 months—1st Class Improver	1.17 " "

Improvers—21 months—1st Class Mechanic (if vacancy exists)	1.20	"	"
Punch & Shearer	1.20	"	"
Helpers—starting rate	.82	"	"
Helpers—first class	.86	"	"
Helpers—heavy forge	1.04	"	"
Helpers—bending slabs	1.00	"	"
Holder-On	1.05	"	"
Tack Welders—First 3 months	.82	"	"
Tack Welders—Second 3 months	1.00	"	"
Tack Welders—Third 3 months	1.14	"	"
Welders (first class)	1.20	"	"
107 Laborers	.82	"	"
Dock Workers 70% at	1.05	"	"
30% at	.91	"	"
Rivet Heater	.91	"	"

The following shall be classified as Mechanics: Blacksmiths, Light Fires, Burners, Boilermakers, Carpenters, Chippers and Caulkers, Shipfitters, Riveters, Drillers, Reamers, Machinists, Outside and Inside, Riggers, Sheetmetal Workers, Plumbers and Pipefitters, Painters, Scalers, Punch & Shearers, Dock Workers, Wood Caulkers, Welders, Crane Operators, Engineers, Acetylene Welders and Brazers.

SECTION 2. During a probationary period of three (3)
108 weeks from the date of his hiring, a new mechanic employee may be paid at the lowest rate of the classification in which the work he is hired for falls. Upon the expiration of the probationary period he shall be paid the regular guaranteed hourly base rate to which he is entitled.

SECTION 3. Specialists shall include Rigger Loftsmen, Mold Loftsmen, Coppersmiths, Heavy Forgers, Pattern

makers, Toolmakers, Layout Ironworkers, Steam Crane Operators, Furnacemen, Flange Turners.

The minimum rate for any specialist shall be $1.28 per hour, except that in any specific case a higher rate may be agreed upon between the Union and the Company.

SECTION 4. It is understood that the above rates and classifications shall remain in effect during the term of this Agreement until and unless otherwise modified by the National War Labor Board in Case No. 111-3516-D (24-524-D).

SECTION 5. Wages shall be paid in cash or check on the 110
Company's time.

SECTION 6. An employee required to work in unclean diesel crank case pits, unclean tanks, unclean bilges, unclean tank tops and unclean oil tanks shall receive extra compensation in addition to his regular compensation for such work, at the rate of one-half his regular hourly base rate of pay. In the event that the representatives of the Company and the Union cannot agree that work in any specific equipment as above enumerated is dirty work under the provisions of this section, then and in that event, the resident inspector of the Government Agency for which the work is being performed shall be consulted, whose decision shall be binding.

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SECTION 7. If a dispute arises as to payment of additional compensation for dirty work or premium work, it shall be disposed of under the provisions of this contract dealing with grievances and no employee shall cease work because of any such refusal to pay additional compensation.

SECTION 8. The Union agrees that apprentices may be employed in such numbers as the Company considered

necessary to maintain an adequate trained working force, first class mechanics and replacements.

An "apprentice" is an employee who agrees to work directly under first class mechanics for a period of time specified in this Article in order to learn a trade and qualify to become a first class mechanic. All apprentices in the employ of the Company shall serve a four year term, during which time the Company will undertake to favor them every reasonable effort to learn their trade, will clarify their tasks accordingly and will provide instructions.

Rates of pay for apprentices shall be as follows pro-
113 vided, however, that no apprentice shall receive an increase in pay at the end of any six months period unless his progress is satisfactory:

First six months	$ .50 per hour
Second six months	.60 " "
Third six months	.74 " "
Fourth six months	.82 " "
Fifth six months	.87 " "
Sixth six months	.92 " "
Seventh six months	1.01 " "
Eighth six months	1.09 " "
First class mechanic's rate thereafter.	

Upon completion of the four year course and upon a
114 Foreman's recommendation, an apprentice shall receive a certificate or letter to that effect and receive the classification of first class mechanic with a seniority status.

Nothing in this Article shall be construed to mean that the Company guarantees or promises that upon the satisfactory completion of his four year term, an apprentice will be employed as a mechanic.

The Foreman or head of the department of any apprentice may discharge any apprentice for lack of skill, ill

health or lack of application and interest in his work and the work of the Company or any other just and proper cause.

ARTICLE VIII

Military Service

Section 1. Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward 116
his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job for which he is re-employed.

ARTICLE IX

117

Safety and Health

Section 1. (a) The Company shall continue its practice of providing reasonable provisions for the safety and health of its employees while at work. Protective devices and other equipment required by law to protect employees from injury shall be provided by the Company. The Union agrees that it will encourage its members to work in a safe manner.

(b) A Safety and Health Committee of five members consisting of two representatives of the Union and three representatives of the Company shall be established.

The Safety Engineer employed by the Company will act as Chairman. The functions and regulations governing the Committee shall be formulated by the said Committee.

ARTICLE X

Traveling Time

An allowance for traveling time shall be granted as follows:
119

1. To jobs outside the yard located on the Brooklyn waterfront between 60th Street, South Brooklyn, and Broadway, Williamsburg Bridge—no travel time.

2. To jobs located in Brooklyn, North of Broadway or south of 60th Street, including ships moored in the Army Base, and jobs located on the Manhattan waterfront either East or North River up to 42nd Street—½ hour each way.

3. To jobs in Manhattan, North of 42nd Street or on the Jersey waterfront as far North as the Fort Lee Ferry and as far south as Jersey City or at Piers 1 to 5 on Staten Island—1 hour each way.

120 4. To jobs in Claremont, New Jersey, or in Clifton or at Piers 6 to 21, Stapleton, Staten Island—1½ hours each way.

5. To jobs in Kearney, Port Newark, Bayway or Bayonne, New Jersey, 1½ hours each way.

6. To jobs at Yonkers or City Island—1¾ hours each way.

7. To jobs at other locations outside the limits of New York City—to be dealt with individually as they arise, consistent with allowances specified above and approximating the time normally required to travel between the Yard and the outside job.

ARTICLE XI

SECTION 1. Should any difference arise between the Company and the Union with respect to any grievance or with respect to the meaning or the application of any of the provisions of this Agreement, they shall be disposed of between the parties hereto and an earnest attempt shall 122
be made to settle such differences within a reasonable time as hereinafter provided.

SECTION 2. All disputes shall be first taken up by the departmental Shop Steward with the Foreman of the department involved.

SECTION 3. Should the dispute remain unresolved, then it shall be discussed by the member or members of the Grievance Committee designated by the Union and by the designated representative for the Company. The Union's Grievance Committee shall consist of no more than five members of the Union who shall be chosen from a designated panel of seven. The Union's Grievance Committee 123
and the Company's representative shall meet regularly once each week. The decision must be given by the Company at the following meeting.

SECTION 4. In the event that a dispute shall not have been settled satisfactorily between the Union and the Company, said dispute shall be submitted to arbitration. If, within five days after the date of the decision of the Com-

pany with which the Union disagrees, the Company and the Union cannot agree upon an arbitrator, the National War Labor Board shall be asked to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters to be arbitrated under the within contract shall be limited to the interpretation and application of the said contract.

SECTION 5. The Company shall keep a record of the decisions reached in all meetings between its representatives and the Union's Grievance Committee, a copy of which
125 record shall be furnished the Union.

SECTION 6. Time lost in the settlement of grievances on Company property during his regular working hours by a Union Officer, Shop Steward or member of the Grievance Committee employed by the Company, shall be paid for by the Company at the regular hourly rate of the employee involved.

SECTION 7. It is understood that discharge cases are to be handled as grievances and in the event that back pay is to be given to reinstated employees, it is understood that an earnest effort will be made by both parties to this Agreement that such grievance be handled and disposed of within a six (6) payroll week period from the date that
126 the grievance is lodged irrespective of whether the grievance is submitted for arbitration.

ARTICLE XII

PROBATIONARY PERIOD—UNFAIR STATEMENTS—EFFECT OF UNION AGREEMENT AND FEDERAL LAW

SECTION 1. New employees shall serve a probationary period of thirty (30) days during which they not only shall

not acquire length of service or seniority rights, but may be laid off; dismissed or transferred at the option of the Company. Length of service or seniority rights where such employee, after a probationary period, is accepted for work, shall be retroactive to the date of commencement of his employment.

SECTION 2. The Company shall not discharge nor suspend any employee save for proper and sufficient reason. A man so discharged or suspended shall be supplied in writing by the Foreman or head of his department with the reasons for such discharge or suspension. A copy of such written reasons for such discharge or suspension shall be 128 furnished the Union's Grievance Committee.

SECTION 3. All cases of discharge or suspension shall be treated as grievances and shall be dealt with in the same manner as other grievances pursuant to Article XI of this Agreement.

ARTICLE XIII

WAGE REOPENING AND SUBORDINATION CLAUSE

SECTION 1. If, during the life of this Agreement, increases in the salaries and/or wages of the employees, to correct maladjustments resulting from rises in the cost of living, should be legally permissible, nothing contained in this contract shall be deemed to prevent the reopening of 129 the wage rates thus affected for renegotiation at the request of either party.

SECTION 2. The terms and conditions of the Atlantic Coast Zone Standards and any directives issued thereunder and any amendments or modifications thereof hereafter effective, are hereby made a part of this Agreement: and if the terms and conditions of this Agreement at any time violate or conflict with the terms of the Atlantic Coast Zone

Standards Agreement, the Zone Standards Agreement shall prevail during the period of the National Emergency.

ARTICLE XIV

This Agreement shall be effective from the date hereof to the 23rd day of June, 1944. Either party, however, may reopen this contract or any part thereof for modification or for amendment (except that rates of pay shall not be changed other than as set forth in Article VII and prior to June 23, 1944) by giving thirty (30) days notice in writing to the other party.

131 If no agreement as to modification or amendment is reached within a further thirty (30) day period, this contract shall be null and void unless an extension of time is agreed upon by both parties in writing.

It is understood and agreed, however, that the sole purpose in so declaring the contract null and void shall be to place the parties hereto in a position to settle the dispute before the War Labor Board.

SULLIVAN DRY DOCK & REPAIR CORPORATION
By GERARD M. McALLISTER
President

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING
132 WORKERS OF AMERICA CIO LOCAL 13

FRED NOLAN	Business Agent
MAX SHARER	Shop Steward
HERBERT ANDERSEN	Shop Steward
JOHN KING	Vice President

FOR THE GENERAL EXECUTIVE BOARD
IUMSWA—CIO

MORRIS MILLER
National Representative

Hearing of August 20, 1945.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD, Plaintiff, vs. SULLIVAN DRY DOCK & REPAIR CORPORATION, Defendant.	Civil 5700

United States Court House,
Brooklyn, N. Y.,
August 20, 1945.

Before: HONORABLE MATTHEW T. ABRUZZO, U. S. D. J.

APPEARANCES:

KNOWLTON DURHAM, Esq., for the plaintiff.
J. READ SMITH, Esq., attorney for defendant.

M. H. GOLDSMITH, Esq., and MR. ROSENFELD, attorneys for Industrial Union of Marine Shipbuilding Workers of America, and Local 13, an affiliate.

HAROLD CAMMER, Esq., attorney for Congress of Industrial Organization.

The Court: Mr. Durham appears for the plaintiff. Is he here?

Mr. Durham: Yes, your Honor.

The Court: Now the Sullivan Dry Dock Corporation appears by whom?

Mr. Smith: By J. Read Smith.

The Court: Are you Mr. Smith?

Mr. Smith: Yes, I am, your Honor.

The Court: I think there are others who want to come in. Suppose we take one at a time. Whom do you represent?

Mr. Rosenfeld: I represent the Industrial Union of Marine Shipbuilding Workers of America, the National Union, and Local 13, a local affiliate. Both of those organizations are parties to the collective bargaining agreement
137 which is now in effect in the shipyards operated by the defendant. I have spoken to counsel for both parties and we have agreed that this motion for formal intervention as an intervening defendant should be heard by your Honor this morning before trial, and I served on both the other parties a copy of my motion and the supporting documents, and may I file the original with your Honor?

The Court: Is there any objection to the intervention?

Mr. Durham: The plaintiff makes this objection, your Honor.

The Court: Well, there is an objection?

Mr. Durham: Yes.

The Court: Do you object, Mr. Smith?

Mr. Smith: I have no objection. I will abide by your decision in the matter.

138 The Court: That is one motion to be heard.

Mr. Rosenfeld: May I continue just a moment? Mr. M. H. Goldstein, of Philadelphia, is general counsel for the Union. Mr. Goldstein is admitted to all the Pennsylvania courts and would like to try this case.

The Court: He is not in yet?

Mr. Rosenfeld: He would like to argue a motion.

The Court: You want him to argue the motion. That is perfectly all right, even though you are not admitted.

Mr. Cammer: I am Harold Cammer. I represent the Congress of Industrial Organizations, which is the CIO and the parent body of the Union which is involved in this action. I have made a motion by notice of motion here Friday to intervene as amicus curiae for the purpose of filing a brief with respect to the issues here involved. 139

The Court: Is there any objection to that motion?

Mr. Durham: The same general objection.

The Court: Is there anybody else? Now suppose we take your motion. I will allow that motion to be filed.

Mr. Goldstein: If the Court please, the intervening parties, or the proposed intervening parties, are, as Mr. Rosenfeld has stated, the Local Union, which has a collective bargaining contract with the defendant Sullivan Dry Dock & Repair Corporation — 140

The Court: Is this plaintiff a member of that Union?

Mr. Goldstein: This plaintiff is, sir. And which has had such a contract since April 6 of 1942. The interest of the Local Union is, of course, in the maintenance of the validity and effectiveness of that contract. The complaint in this cause would have you enter a declaratory judgment that—paraphrasing the complaint—the protests made by Local 13 against the granting of special privileges to the complainant should be held not to be good cause within the purview of Section 8 of the Selective Training and Service Act of 1940, for the deprivation of the plaintiff of any opportunity to work. In effect, that request to your Honor, or the Court, to issue such a declaratory judgment would be, if decided by you favorably, a finding that the seniority clauses and various other clauses of the contract were ineffectual, or invalid, indeed, under the Selective Training and Service Act of 1940, in the protection of certain of the rights of the various employees, whether union members or not, and of the defendant, for whom Local 13, under an Act of Congress, the National Labor Relations Act, is the exclusive collective bargaining 141

agent. Those employees, under the Act of Congress and under the decisions of the Supreme Court, are bound, as is the defendant himself, the defendant employer, by the bargain made collectively for all of the employees, irrespective of whether they are or are not members of the Union. Under other decisions——

The Court: What would be the objection to their coming in? They seem to have a stake in this. What is your objection?

Mr. Durham: I want to explain. We are very much interested in getting this question settled and, from that point of view, I would have no objection to their filing any
143 brief with your Honor that they wish to file. It seems to me they are not proper parties to this proceeding.

The Court: They might be on the theory that the contract here before me apparently is the contract which all of the members of that local had. Is that right? Now, they might have a stake in this particular contract, might they not, that would be to the benefit of or to the detriment of everyody else in that Union.

Mr. Durham: This contract was made two years after the Selective Training and Service Act was enacted.

The Court: I am inclined to think that particular local ought to be in here.

Mr. Durham: Speed is of the essence in this case.

The Court: There will be no delay. I might as well make the announcement there will be no delay in this thing
144 whatsoever. I am taking time out in the summer to try this case, when we never try cases like this in the summer, and I am sure I will not allow counsel to delay it.

Mr. Goldstein: We are prepared to proceed immediately.

The Court: All right. I will let you in.

Mr. Goldstein: Would you care to hear from me as to the National Union?

The Court: No. This is only the local.

Mr. Goldstein: Would you hear me for one moment for the National?

The Court: What is the number of the local?

Mr. Goldstein: Local 13 of the Industrial Union of Marine Shipbuilding Workers of America. Now, the local's autonomy, pursuant to the provisions of the National Organization's constitution, was suspended, temporarily suspended, in January of this year. The appointees of the National Organization, most of them members of the local, are now administering the affairs of the local. The National Organization is hence responsible as trustee for the contract and for the maintenance of its validity and complete effectiveness.

The Court: What you mean is the CIO is really the parent of this child.

Mr. Goldstein: I am not speaking for the CIO. I am speaking for the National Union, the Industrial Union of Marine Shipbuilding Workers of America, which has quite a number of locals, among them Local 13.

The Court: Why shouldn't they be in as amicus curiae? Only one has a stake. I will let anybody in as amicus curiae.

Mr. Goldstein: It is not going to make any material difference, except——

The Court: There is a great deal of difference if there is an appeal. An amicus curiae would have no standing on an appeal, whereas as a party he would have a standing.

Mr. Goldstein: You are quite right, sir, but at the present time the affairs of Local 13 are being administered by the National Organization.

The Court: 13 is administering them, too, isn't it?

Mr. Goldstein: They exist, of course, as members——

The Court: I don't think your parent organization has an interest which would be violated in any way by not letting it in, because if I would allow the local in that would permit you to bring up anything you might possibly

want to bring up. You can file a brief as amicus curiae for that particular organization.

Mr. Goldtein: Since you have admitted the local as a defendant intervenor, would you be so good as to reserve the other point for further deliberation later?

The Court: I will reserve that until you file a brief. If I see you have any interest which might be harmed, I do not want you to lose it. On the other hand, if your interest is protected by one, you are not going to be more protected by two. What is the next?

Mr. Cammer: My motion is simply to intervene as an amicus curiae for the Congress of Industrial Organiza-
149 tions.

The Court: I see no objection to that. I will allow it. The record will show you have a right to file a brief.

Mr. Cammer: I have it here.

The Court: Suppose you make an opening statement.

Mr. Durham: If your Honor please, the Selective Training and Service Act of 1940 contains the law which is applicable to this case. May I give your Honor this brief which I prepared, which quotes the law, and it may be of help to you in following any argument. One page 2 of the brief, the law is quoted, the applicable parts of it are quoted, and it provides that any person who has been inducted into the armed forces and satisfactorily completes his period of training and service shall be entitled to a certificate to that effect upon the completion of such period
150 of training and service. Then it provides that in case such person, in order to perform such training and service has left or leaves a position other than a temporary one in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position and (3) makes application for re-employment within ninety days—I might explain at the time applicable here that was forty days and the statute was subsequently

amended to ninety—if he makes application within ninety days after he is released from such training and service. Then the next section says, "If such position"—I will skip that one. Section B says, "If such person was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

I call attention to the fact, your Honor, that those are the conditions and the only conditions stated in the Act itself as to the re-employment, or the restoration rather, of the veteran who returns and makes application. He must have the certificate, he must be still qualified, he must make his application within the designated number of days and he must be restored to that position or a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable.

The next section I have quoted here, subsection C of Section 8, provides that the veteran, after being restored, shall be considered as having been on furlough or leave of absence during his period of training and service and shall be so restored without loss of seniority, he shall be entitled to participate in insurance or other benefits offered by the employer and shall not be discharged from such position without cause within one year after such restoration.

Now, as I understand the question at issue here, it is simply whether a veteran who has qualified with those four conditions and is restored to his position, the position which he formerly occupied, or call it a job, can he or should he replace a non-veteran who has greater seniority if there is only one job for the two in the plant? That, as I understand it, is the essence of the question before us today.

The Court: Do you mean is that the question the defendant is raising?

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Mr. Durham: Yes. Our position is that the Act, as I have read it, intended to give that veteran his job, the job he held when he was inducted, and to guarantee him that job for the period of a year, unless such a condition would be impossible or unreasonable in so far as the employer is concerned. That is our position. We say that, if the employer has still a job available for a man with this man's qualifications and he comes back and asks for that job, he is entitled to it even if he has to replace some non-veteran who may have greater seniority than he. Here we are dealing with a statute that Congress has enacted and we have to take it as it is enacted and, if that is one of the effects
155 of it, it is up to Congress to make what appropriate revision of the law is necessary.

The Court: Mr. Smith, what is your answer to all this?

Mr. Smith: If your Honor please, this company, as you are aware, is engaged in the repair of ships and up to the present time over 600 of its employees have gone into the armed services and many of them have returned and have been put to work. We expect many more will be returned and we hope to put them to work. However, Congress has set up this law referred to by Colonel Durham, the Selective Training and Service Act of 1940, defining the rights of the returning veterans and the obligations of their former employers. There is some ambiguity, evidently, in this law. This has been recognized by the United States Attorney General, who has instructed his local districts,
156 when a case of this type had come into their office, they were to put before the Court all the facts on both sides of the case. In a sense the company in this case intends to take the same attitude. It is not in here in the usual position of the defendant and it does not wish to put in a defense in the legalistic sense of the word. It wishes to have this matter heard so that we can get on with our work. It has no particular interest as to the type of adjudication involved here.

The Court: What is your reason for not taking them?

Mr. Smith: There are two interpretations of this law up to the present time. Under the Act this Court is the only competent authority to actually interpret the law. The Selective headquarters has interpreted the law to be that this veteran and all veterans in similar categories are entitled to what they call super seniority; that is, as Mr. Durham explained, he must be kept at work if there is a job to be done in his department for which he is capable. Under our present contract with the Union this veteran, as other veterans, are entitled to what you might term accumulated seniority; in other words, for the time they have spent in the armed service they are entitled to accumulate their seniority as though they had never left the company and, when they come back here, granted that seniority

The Court: That question is not before me, is it, the accumulated seniority under the contract of the Union with you? Is that question before me?

Mr. Smith: The National War Labor Board, through its arbitrators, and the Department of Labor and the unions have taken the position that the meaning of the Selective Training and Service Act is that this employee must be given his accumulated seniority, but no more.

The Court: You mean that, in effect, gives him the accumulated seniority that is set forth in the contract with the Union?

Mr. Smith: That is correct, and no more. In other words, the Act and the contract do not disagree in any way. The language is somewhat different but the purport is the same.

The Court: I do not quite follow that. The Act says he must be given a like seniority. Would that mean the seniority he had when he left?

Mr. Smith: That is correct.

The Court: How could you put the interpretation, if he waited for a year he would be entitled to go back and have

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an accumulated seniority the contract sets forth? It might run from an ordinary mechanic up to a superintendent if he was away long enough.

Mr. Smith: No. You cannot go ahead of your place or seniority. If you are steadily employed, you remain in that position, and, as employees either leave the company, die, or are discharged, or for any reason leave the company's employ, then you move up, and only under those circumstances. This employee was moved up by the company as those circumstances took place all the time he was in the armed service.

The Court: Is there any real issue of facts?

161 Mr. Smith: I don't think there is, your Honor.

The Court: Have you attempted to draw any stipulation?

Mr. Durham: No, but I think we could very quickly.

Mr. Smith: I think I could read into the record a stipulation that would satisfy Colonel Durham and satisfy myself.

The Court: You have an intervenor here.

Mr. Goldstein: You will have to satisfy me. I am sorry.

Mr. Smith: I think you will be satisfied, too.

Mr. Durham: I thought if we took the complaint and went right down through it, we could stipulate practically everything, and Mr. Fishgold is here to testify to anything we cannot agree on.

Mr. Smith: The main objection of the company to the
162 wording of the complaint——

The Court: I don't think you can do it that way. I think if the Colonel will start in to read what he would like stipulated, and then you men both can signify whether you agree or not. Maybe you will agree to everything he wants.

Mr. Durham: I am going to follow the complaint. I would like it stipulated that the plaintiff is a resident of the Borough of Brooklyn.

Mr. Smith: I have no objection.

Mr. Goldstein: I have none, either.

Mr. Durham: Paragraph 2 is admitted, that at all times the defendant was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

Paragraph 3 is admitted, that at all times hereinafter mentioned the defendant was and still is engaged in the business of constructing and repairing naval and other vessels of various types at its shipyard at the foot of 23rd Street, Borough of Brooklyn, City and State of New York.

Paragraph 4 is denied in part. I would like it stipulated that prior to the 22nd day of May, 1943, plaintiff was employed by the defendant as a welder in a position other 164
than temporary at its plant in the Borough of Brooklyn.

Mr. Smith: As to that, if your Honor please, we will admit that he was employed by the defendant as a welder for several months prior, but I think the legal effect of the word "temporary" should be decided by the Court.

Mr. Durham: Will you stipulate he was employed steadily for a period of seven months?

Mr. Smith: I will.

Mr. Durham: Is that correct, Mr. Fishgold?

The Plaintiff: Yes.

The Court: That stipulation is made in conformity with the claim of the defendant. Whether that means, as set forth in the paragraph, temporary or permanent is for the Court.

Mr. Smith: That is right. 165

Mr. Goldstein: May I ask here will there be produced proof before the Court, Mr. Smith, as to the number of other employees who prior to May 1943 were inducted into the armed forces?

Mr. Smith: We do not intend to submit any proof.

Mr. Goldstein: The construction Mr. Durham is contending for is one that has been made by the Selective Service Administration and they have given their definition

also of what they contend constitutes a temporary employee. They say a person who is employed in the place of a departed employee, departed into the armed forces, is a temporary employee. Now, I don't know whether under that interpretation Mr. Durham wants to assert that Mr. Fishgold, the plaintiff here, was or was not temporary insofar as——

The Court: I think I see what you mean. Will you concede, Mr. Smith, that when this plaintiff left and another employee was taken in his place by the Sullivan Company——

Mr. Goldstein: That is not my point, if the Court please.

167 The Court: That is my point.

Mr. Smith: We have hired other employees to do his work.

The Court: You took in other employees to do the work that he was doing.

Mr. Smith: That is correct.

Mr. Goldstein: The next concession I should like to have in the record would be the concession that prior to the 22nd of May, 1943, when the plaintiff was inducted, other employees of the corporation's welding department had been inducted in the armed forces and that the occasion for the plaintiff's employment, was, in part, the need to fill their places.

Mr. Smith: I couldn't stipulate that, because I have not made an investigation along those lines.

168 Mr. Goldstein: You could find out by calling your personnel department as to whether other members of the welding department had been inducted prior to May 22, 1943.

Mr. Smith: That would have to be done.

The Court: You had better make a note of that. We cannot have another hearing, but stipulate to it in writing and make a note to check that. He said in the opening some 600 different employees had gone into the service. I

don't know that your point is very important or not to me. What is important to me is whether it was temporary or not, whether another person took his place or not. If another person took his place, it would be pretty good proof it was not a temporary position that he left. Temporary positions, when people leave, so to speak, are not really filled, are they?

Mr. Durham: Paragraph 5th, that on or about May 22, 1943, plaintiff was inducted into the armed forces of the United States under the provisions of the Selective Training and Service Act of 1940, as amended, for training and service, and that on or about such day, in order to perform such training and service, he left his position of employment with said defendant.

Mr. Smith: I have no objection.

Mr. Goldstein: No objection.

Mr. Durham: Sixth, thereafter plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which date he was honorably discharged therefrom with a certificate that he had satisfactorily completed his period of training and service. I would like to offer in evidence the certificate of honorable discharge, the original, and leave a photostatic copy for the record.

The Court: Is there any objection to the photostatic copy being introduced in evidence instead of the original?

Mr. Smith: No objection.

Mr. Goldstein: None.

(Copy of certificate of discharge of plaintiff received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Durham: Seventh, that within 40 days after his discharge from the Army of the United States and on or before the 21st day of August, 1944, the plaintiff applied to the defendant for reinstatement in his former employment with the defendant and that at the time of making

such application he was qualified to perform the duties of the position he had formerly occupied.

Mr. Smith: No objection.

Mr. Goldstein: None from me.

Mr. Durham: That on or about August 25, 1944, defendant restored plaintiff to his former position, but thereafter, and from time to time the defendant, without cause, and contrary to the provisions of the Selective Training and Service Act——

The Court: In your stipulation of facts, my suggestion is to keep away from any legal implications. Let us get the facts.

173 Mr. Durham: Thereafter, and from time to time the defendant laid off the plaintiff from such employment and refused to permit him to work in its employment on the following days, namely, April 9th, 10th and 11th, May 17th, 18th and 19th, 20th, 21st, 22nd, 23rd and 24th, 1945, and that on each of such days the plaintiff's wages, had he been employed by the defendant, would have amounted to a minimum of $9.60 for eight hours of work.

Mr. Goldstein: I object to that. The ground for my objection is to only one rather narrow portion of the offer made by Mr. Durham. I object to the use of the phrase "laid off", because I think it represents a conclusion both of fact and of law. I do not know whether I am speaking the piece that Mr. Smith should now speak, but I also should object to the phrase, "refused to permit him to
174 work." I would have no objection to the stipulation if it were amended as follows, everything as Mr. Durham spoke it except that we would say "and from time to time the defendant did not assign the plaintiff to work in its employment on the following days." You will see the reason for that, if the Court please.

The Court: I really do not.

Mr. Goldstein: When we describe the method of operation of the plant and the method of job assignment from day to day.

175

The Court: I think it is six of one and half a dozen of the other. The part of the statute he is apparently trying to invoke here is that the work for a year is guaranteed; rain, shine, or what have you, he is supposed to have it. No matter what the reason for laying off is, if he is not ill and can work the defendant is supposed to have him working.

Mr. Durham: So long as it is not impossible or unreasonable for the employer.

Mr. Goldstein: My objection is not at all aimed at any reason. As a matter of fact, the paragraph read by Mr. Durham——

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The Court: Is there any objection?

Mr. Smith: I have the same objection as Mr. Goldstein. I think as it develops here a little further, you might get a little better idea of the reasons for it.

The Court: Have you any suggestion?

Mr. Smith: If he changes "laid off" to "shaped up" I will have no objection. I have an objection to the two days April 10th and May 20th.

The Court: You will agree to nine of the eleven days. You agree to every day except April 10th and May 20th. You agree, on the days set forth in paragraph 8, that the defendant did not provide work for this plaintiff. Is that right?

Mr. Smith: I would have to insist on the use of the words "shaped up".

177

The Court: What does "shaped up" mean?

Mr. Smith: I intend to bring that up later. It requires a lengthy explanation.

The Court: Let him come up here and we will swear him, and we will take this proof as we go along.

ABRAHAM FISHGOLD, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Court: Do you mind if I do it my way?

Mr. Durham: No, sir.

By the Court.

Q. On April 9th did you appear at the Sullivan Shipyards for work? A. Yes, sir.

Q. Were you given work? A. No.

Q. On the 10th, the same thing? A. That is right.

179 Q. Were you given work? A. No, sir.

Q. The 11th? A. No, sir.

Q. Were you given work? A. No, sir.

Q. You were there ready to do work; is that right? A. Yes, sir.

Q. On those three days? A. Yes, sir.

Q. The same thing happened on May 17th? A. That is right.

Q. And May 18th? A. That is right.

Q. And May 19th? A. That is right.

Q. May 20th? A. That is right.

Q. May 22nd, 23rd and 24th, 1945? A. Yes, sir.

Q. In other words, you were perfectly fit on each one of those days; you presented yourself for work and you

180 asked them for work and the company did not provide you with any work; is that right? A. Yes, sir.

Mr. Durham: Defendant's plant was in operation and other employees possessing the same or comparable skill and experience of the plaintiff were continued at work by the defendant.

Mr. Smith: That is true on every day but May 20th.

The Court: You have stipulated on every day but the 20th; is that right?

Mr. Smith: That is correct.

The Court: Why don't you stipulate the 20th?

Mr. Smith: It was a Sunday and nobody worked.

Mr. Durham: That is all right. We won't make any point of that.

The Court: Yes, that was a Sunday. Do you agree to take that out?

Mr. Durham: I am not going to make any point of it.

The Court: All right. May 20th they take out.

Mr. Durham: The 10th is a legal point. 182

The Court: Well, you cannot stipulate that.

Mr. Durham: No. The second cause of action is also of that nature.

The Court: Is it agreeable the same facts are stipulated in the second cause of action?

Mr. Goldstein: It is agreeable so far as I am concerned.

The Court: Do you want to add anything in the second cause of action to that which has already been stipulated?

Mr. Durham: I want to add paragraph 14th, that plaintiff protested to the defendant against being laid off by the defendant, but the defendant continued and does still continue to lay him off from time to time when there is not sufficient work to occupy all of the employees of the defendant holding positions similar or comparable to that of the plaintiff. 183

Mr. Smith: In the first place, we still make that distinction between laying off and shaping up, and I want to go further and state this employee is presently working for the company and has been for some time past.

Mr. Durham: We do not claim any other days than those mentioned in the previous testimony of the witness.

The Court: Those are the only days you claim. Then I think that the rest of that is unnecessary.

By the Court.

Q. Are you now working for the company, Mr. Fishgold? A. Yes, sir.

Q. And the only days you claim they did not provide you with work are the days you just testified to, and you have agreed to exclude May 20th? A. That is right.

185 Q. And since that time you have had steady work? A. That is right.

The Court: What do you need anything else for?

Mr. Durham: I wanted the protest.

The Court: He does not have to protest, does he?

Mr. Durham: Very well.

The Court: He is either entitled to it under the statute or he is not. I don't think you have to add to what you are entitled to under the statute. It is a statutory provision.

By the Court.

186 Q. You were not paid for those days you testified to? A. No, sir.

Mr. Durham: I would like the defendant to produce a letter received from the representative of Local No. 13, dated March 16, 1945.

(Mr. Smith produces letter.)

Mr. Durham: I offer that in evidence.

Mr. Goldstein: Are we proceeding with proof or with a stipulation?

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The Court: Both proof and a stipulation. I think in this way we will get along faster. Wherever the fact cannot be conceded we will take the plaintiff's evidence on it.

Mr. Durham: I would like the stipulation that——

The Court: Have you offered that in evidence?

Mr. Durham: I offer this in evidence, the letter of John J. King, business agent of the Brooklyn Local No. 13 of this union, making a protest.

The Court: May I see it?

(Mr. Durham hands paper to the Court.)

Mr. Goldstein: No objection.

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(Letter dated March 16, 1945, from Local No. 13 to the defendant, received in evidence and marked Plaintiff's Exhibit 2.)

The Court: Is there anything more you want, Colonel Durham?

Mr. Durham: No, sir.

The Court: As I figure it, in view of the elimination of May 20th, the judgment of $115.60 which you request must be reduced by $9.60. Is that right?

Mr. Durham: That is correct.

The Court: So that you would be entitled to a judgment of $106; is that right?

Mr. Smith: I do not want to quibble over a few dollars, but I think there is another date out of there. I think the Colonel agreed there were only nine days. April 10th the date is. Our records indicate that he worked on that day.

189

By the Court.

Q. Do you remember that? A. It is pretty far back.

Q. That is why their records might be much better than your memory? A. Yes, sir.

The Court: Do you want to take April 10th out?

Mr. Durham: We won't make any point of it.

The Court: $96.40?

Mr. Durham: We also request a declaratory judgment that the defendant be specifically required——

The Court: Wait, Colonel. I want to get your facts. Are those all the facts that you want to present to the Court, or are there more?

Mr. Durham: Those are all the facts.

The Court: Have you any facts to present?

Mr. Goldstein: A considerable number, sir. I presume Mr. Smith, however, will want to go ahead before
191 me and his doing so will perhaps save my putting in some facts.

The Court: Have you any facts you want to put in?

Mr. Smith: I have, and I think most of them can be stipulated.

The Court: What are the facts you want to stipulate?

Mr. Smith: If I may read this. It may divert somewhat from the actual answer in which I set forth a complete defense and affirmative defense.

The Court: Are you following your answer?

Mr. Smith: I do not intend to exactly, your Honor. That after a hearing before the National Labor Relations Board and an election had thereon, Local 13 of
192 the Industrial Union of Marine and Shipbuilding Workers of America, CIO, was, on February 20, 1942, certified by the National Labor Relations Board pursuant to the National Labor Relations Act as the exclusive bargaining representative for all the defendant's production and maintenance employees, including welders. That pursuant to the certification of February 20, 1942——

The Court: Wait a minute. Is that conceded?

Mr. Goldstein: It is, so far as the intervenor is concerned.

Mr. Durham: Just a minute. The plaintiff will concede that without admitting that it is material.

The Court: That is not the point at the moment, Colonel. The point is to get a stipulation of the facts if we can. Then what importance those facts have on the case at issue we can subsequently agree on. I might agree with some of you and disagree with some, but I would like to have everything you want to put in the case first. Just make the record complete.

Mr. Smith: That pursuant to the certification of February 20, 1942, and the National Labor Relations 194
Act, the defendant was obliged to and did enter into a labor agreement with Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, CIO, which agreement, among other things, contained the following provisions.

Mr. Goldstein: I would be ready to stipulate to that. May I make the suggestion that we give the Court for the record the date of the execution of the contract, April 6, 1942?

Mr. Smith: Any employee, other than a probationary employee, who volunteers for or is drafted into the naval or military service of the United States shall retain his length of service standing and shall have the time spent by him in such service count towards his
length of service standing. The employee so volun- 195
teering or drafted must give the company notice in writing of his intention to so leave his employment. Any such employee who within 40 days of release or discharge from said service applies for reemployment shall be rehired, provided he is fit for duty and work is available. The availability of work will be determined in accordance with length of service and ability.

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If reemployed, the said employee shall receive the then current rate of pay for the job for which he is reemployed. That on or about May 17, 1944, the defendant entered into a new agreement with Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, CIO.

Mr. Goldstein: Possibly we can put the record in a more logical and chronological state, if you also read the other provision, which might be pertinent.

Mr. Smith: I would rather do that next, if you don't mind.

Mr. Goldstein: All right.

197 Mr. Smith: That on May 17, 1944, the defendant entered into a new agreement with Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, CIO, containing the following provision: Any employee, other than a probationary employee, who is drafted or volunteers for naval, military or merchant marine service with the United States shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count towards his seniority as if he were actually and continually employed by the company. Any such employee who volunteers or is drafted, must give the company notice of his intention to so leave his employment. Any such employee who within 40 days after his release or
198 discharge from said service applies for reemployment shall be rehired by the company provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, the said employee shall then receive the then current rate of pay for the job for which he is reemployed.

Mr. Durham: I will agree to that.

Mr. Smith: That by order of the National War Labor Board Shipbuilding Commission, dated February 25, 1944, the following provision was included in the contract between the defendant and the Industrial Union of Marine and Shipbuilding Workers of America, Local 13, CIO: "Promotions and reclassification and increases or decreases in the working force shall be based upon length of service and ability to do the job. Whenever between two or more men ability is fairly equal, length of service shall be the controlling factor."

I would like to put in evidence the directive order containing that provision.

Mr. Durham: No objection.

Mr. Goldstein: No objection.

Mr. Smith: The date is February 25, 1944.

(Order of National War Labor Board Shipbuilding Commission dated February 25, 1944, received in evidence and marked Defendant's Exhibit A.)

Mr. Smith: That on or about August 25, 1944, the said labor agreement contained and at the present time does contain the following provision: Should any difference arise between the company and the union with respect to any grievance or with respect to the meaning or the application of any of the provisions of this agreement, they shall be disposed of between the parties hereto and an earnest attempt shall be made to settle such differences within a reasonable time as hereinafter provided. In the event that a dispute shall not be settled satisfactorily between the union and the company, said dispute shall be submitted to arbitration. If within five days after the date of the decision of the company with which the union disagrees, the company and the union cannot agree upon an arbitrator, the National War Labor Board shall be asked

to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters so arbitrated under the within contract shall be limited to the interpretation and application of the said contract.

The Court: How many more of those have you got?

Mr. Smith: I have no more provisions of the contract to read.

The Court: How do the provisions of the contract between your company and this union apply here?

Mr. Smith: Under this contract——

The Court: All I am asked to do is interpret this
203 Selective Service Act. Now, assume that your company and this union, this Local 13, have an agreement which is different than the Selective Service Act. I am not calling upon you to interpret that, but would you agree to that conclusion that I have just made?

Mr. Smith: Not quite, your Honor, in this respect: this contract was entered into——

The Court: No. Suppose we do not take this contract. Suppose a contract of any kind is different from the Selective Service Act. Which do you think I would have to apply?

Mr. Smith: I think you would have to apply the Act, but the company was put in this position.

The Court: You do not agree to that?

Mr. Goldstein: I would not quite agree to that, be-
204 cause there might very well be a constitutional question as to whether there had been an Act passed under circumstances and with authority such as would warrant the impairment of the obligation of a contract, but I don't think that is before you.

The Court: I am of the opinion at the moment, sir, that if the Selective Service Act was different than your contract in any way, I would still be bound to apply the Selective Service Act, even though you have

done more under that contract, or vice versa, if you did less he would get more under the Selective Service. It makes no reference to the National Labor Relations Board or to the union or anything. The Congress apparently took the bit in its teeth and said, "We are going to set the line and nobody will apply anything to affect it except Selective Service."

Mr. Goldstein: You have the problem of the construction of the contract on another ground. What the Act says is that the reemployed veteran must be restored to his job, or a similar one, without loss of seniority. Now, just what did Congress intend there? It is our contention Congress intended to give the veteran precisely that which he would have had had he not left the employ of the company. 206

The Court: No, I don't think so. Offhand I would say no. I would say that what Congress intended to do would be the logical thing. Here is a man who left a job which paid him $9.60. Now, that same job should be there for him when he came back, and, if he was away nine years, we will say, if your construction is right, then, by absence in the army, he could come back a superintendent.

Mr. Goldstein: No, no.

The Court: He could be if your argument held. Seniority accumulated until he got up to that point. I am not certain of that.

Mr. Goldstein: The Act, of course, does not define the word "seniority" as used there. You are going to have to look elsewhere to find the meaning of that term than the Act. 207

The Court: Seniority can only mean one thing in my mind, that he is assured of the same job he had when he left, without any ups or downs.

Mr. Goldstein: I think Congress was a bit more generous than that.

The Court: He cannot improve himself, but he cannot be any worse off. I think that is logical.

Mr. Smith: That is what happened in this case. If he had not gone into the army he would be in the same position.

Mr. Goldstein: The thing is to determine whether or not he is getting what Congress wanted him to get.

The Court: What else have you? Put in all in the record you think would help me.

Mr. Smith: That on or about August 25, 1944, the defendant restored the plaintiff to his former position and employment and the plaintiff has since that date
209 been and still is employed by the defendant, although from time to time between August 25, 1944, and the present date, due to the exigencies of production and the periodic drop off of available work, plaintiff has been shaped up pursuant to the provisions of the aforesaid labor agreement.

Mr. Durham: There we come to that same difficulty again.

The Court: You cannot concede that, because that is a matter for the defendant to put to proof. I don't know what "shape up" means. It may have one meaning down at the docks and another meaning here. I think, if you want to put in any proof as to that, you will have to call witnesses. A witness may go on the stand and say "Well, there wasn't any work for
210 this man." They might have wanted work for others. It might be under the statute they should have let the others go and shaped him in and shaped the others out. I don't know. I don't think you can concede that. I will give you a chance to put in any proof you want to. Make a note of that.

Mr. Smith: That on or about March 31, 1945, the plaintiff herein was permitted to work in the defend-

ant's plant although its employee G. Jackerson had shaped up.

The Court: Who was he?

Mr. Smith: He was the instrument through which this question got before the War Labor Board. It was this employee who had more seniority than Mr. Fishgold, who originated this case into the War Labor Board.

The Court: You had better give me some proof on that. That might be a very important question.

Mr. Smith: I don't think there is any question on that.

Mr. Durham: I know nothing about it one way or the other, except what you told me.

Mr. Smith: It is noted in the arbitrator's award, which I think you have a copy of.

The Court: I will want proof on that, too.

Mr. Smith: All right. That on or about April 2, 1945, Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America filed a written grievance with the defendant pursuant to the terms of the aforesaid labor agreement. Said grievance, in effect, protested the action of the defendant in shaping up the said G. Jackerson and permitting the plaintiff to work in his stead.

Mr. Durham: I know nothing about it.

The Court: That would not hurt you.

Mr. Durham: No. The protest I offered was the one of March 16th.

The Court: You had better give me some proof on that.

Mr. Smith: All right.

Mr. Goldstein: There were many things that we didn't know that were alleged in the complaint which we conceded.

The Court: This question is very important.

Mr. Smith: Of course, the next one Colonel Durham would not know anything about, either. There is no sense in going on if he is not able to concede the facts.

Mr. Goldstein: I would like to ask Mr. Smith something on this.

(Mr. Goldstein confers with Mr. Smith.)

Mr. Goldstein: I think Mr. Smith covered most of the points I would have made, with the possible exception of one or two. It does not appear from the stipulation offered by Mr. Smith that a certain paragraph of the contract——

215 The Court: Why don't you offer the whole contract in evidence? Have you got the whole contract here?

Mr. Goldstein: Yes, with a lot of other material in it. There is just one short paragraph I want to prove existed at the time the plaintiff was inducted. In the contract of April 6, 1942, which remained in effect until the date a new agreement was signed, namely May 17, 1944, there was contained the following provision: "In all cases of promotion, increase or decrease in the working force, the total accumulated length of service and ability to do the job shall be the basis for any such promotions or increases or decreases in the working force."

Mr. Durham: No objection.

Mr. Goldstein: One further supplementation of a
216 portion of Mr. Smith's offer; that is, I think it was purely an oversight on his part he did not mention it, and that is that the clause on military service which he read out of the contract of May 17, 1944, was, equally with the other clause which he read into the record out of that contract, ordered by the National War Labor Board and the Shipbuilding Commission to be inserted in the contract.

Mr. Durham: You are referring to the contract of April 6, 1942?

Mr. Goldstein: No; of May 17, 1944.

Mr. Smith: There are just one or two more here.

The Court: Go ahead.

Mr. Smith: As a result of the protest by the union, the question went to arbitration and an arbitrator was appointed by the National War Labor Board, who heard the case and decided it in favor of the union.

Mr. Durham: I have no objection to that if it is made to appear that the plaintiff was not a party in any way to the arbitration. He was not even notified of it. 218

The Court: Who is Jackerson? How does he enter into this?

Mr. Smith: He is, as you might say, one of the employees.

The Court: A welder, too?

Mr. Smith: A welder who had more seniority than the plaintiff in this case, whom we shaped up, you might say, to put Mr. Fishgold, the plaintiff, to work. We did that at the request of the Selective Service Headquarters.

The Court: You had better made that a little clearer. You had Jackerson working for you?

Mr. Smith: Jackerson, yes.

The Court: Was Jackerson at any time in this war? 219

Mr. Smith: Not to my knowledge, no.

Mr. Durham: He was a non-veteran.

The Court: Now, when Fishgold came back, was Jackerson still working for you?

Mr. Smith: He was.

The Court: What relation has Jackerson got to Fishgold?

Mr. Smith: Selective Service Headquarters in New York City made an interpretation of this law and they

told us that under the law a returning veteran was entitled to superseniority, and I think your Honor has had that explained to you already this morning.

The Court: Yes.

Mr. Smith: That would mean that in this case the plaintiff would be entitled to work regardless of who else worked or did not work. This employee Jackerson had greater seniority than the plaintiff, and in the ordinary course of events on certain particular days Jackerson would have worked and Fishgold would not have worked. That is pursuant to the terms of the contract. However, because Selective Service Head-
221 quarters had asked that we keep the veteran at work, we did so, regardless of the terms of the contract.

The Court: You mean the terms of the contract with whom?

Mr. Smith: With the union.

The Court: With Local 13?

Mr. Smith: That is correct. As a result, the union filed a grievance, or a protest.

The Court: To what effect?

Mr. Smith: That the plaintiff in this case should not have worked on a certain particular day, or days, and that Jackerson should have worked. As a result of that protest, the grievance was heard by the company's representative and decided in favor of the vet-
222 eran.

The Court: Of Fishgold?

Mr. Smith: Of Fishgold against the union.

The Court: Against the union's protest?

Mr. Smith: That is right. Under the provisions of the contract, the union then had a right to go to the War Labor Board.

The Court: Did they?

Mr. Smith: They did. An arbitrator was appointed and he decided the company should not have shaped

up Jackerson but should have shaped up Fishgold on those particular days. There were several other employees involved, too, and the company had reimbursed those employees although they did not work and this veteran did work.

The Court: So that all along the line Fishgold won out, even against the protest of his own Local 13?

Mr. Smith: As far as the company was concerned, he did, but the War Labor Board stepped in and made a contrary decision.

The Court: The Labor Board sustained Fishgold?

Mr. Smith: No; they sustained the union.

The Court: They sustained Jackerson? 224

Mr. Smith: That is correct, and the union.

The Court: You just said that Fishgold was sustained by the Labor Board. You mean Jackerson was sustained?

Mr. Smith: That is correct.

The Court: I can see you were kind of caught in the middle there.

Mr. Smith: That is what happened.

The Court: When you try to please both sides you wind up pleasing nobody.

Mr. Smith: That is what happened.

The Court: Tell me this. There has been a Selective Service interpretation of this whole thing, hasn't there?

Mr. Smith: There has been a National War Labor 225 Board interpretation.

The Court: Have you ever had any court interpretation?

Mr. Smith: This is it.

The Court: This is the first case.

Mr. Goldstein: I am informed there is now pending in the District Court in Detroit a similar case.

Mr. Smith: I don't think it has reached the same position as ours.

The Court: All right. What else is there?

Mr. Smith: I would like to read in evidence the decision and opinion of the arbitrator of the National War Labor Board.

The Court: That you can cite in your brief.

Mr. Smith: It is in my pleadings, your Honor.

The Court: That is a part of the law. Now are there any other facts?

Mr. Goldstein: I don't quite know where we are with this recital Mr. Smith made as to the occasion
227 for the shaping up of Mr. Fishgold, and then failing to shape him up and then shaping him again.

The Court: Do you want to bring someone here to testify tomorrow morning about some of those stipulations which could not be conceded?

Mr. Smith: I myself could testify as to the proceedings between the Union and the defendant and the proceedings with the War Labor Board.

The Court: You said something about shaping up.

Mr. Smith: I have a witness here now who can explain that.

The Court: Then put him on.

Mr. Smith: I would like to put him on in the usual course after the plaintiff has finished his case.

The Court: Have you rested your case?

228 Mr. Durham: No, I have not. I would like to offer in evidence Local Board Memorandum No. 190-A issued by National Selective Service Headquarters, dated May 20, 1944, with reference to two or three paragraphs. They are rather short and perhaps it would be better for me to read them into the record rather than submit this whole memorandum.

Mr. Smith: I have no objection to the Court being apprised of those Selective Service Headquarters

memoranda, but I do object to them being placed in evidence. I do not see the relevancy.

Mr. Goldstein: I join in that objection.

The Court: I am not bound by it. It might be helpful to me in deciding this issue, but I am not bound by it at all. You can refer to that in your briefs.

Mr. Durham: I would also like to offer in evidence a portion of the hearings before a special subcommittee of the Committee on Military Affairs of the House of Representatives.

The Court: That is a matter of law, too. Just put that in your brief. That is not a fact. That is a legal matter that belongs in your brief.

Mr. Durham: Then I can quote from this memorandum?

The Court: Oh, sure. You can quote from anything. You can quote from the Bible if you wish. That is always a safe thing to quote from. Have you rested?

Mr. Goldstein: No. I would like to clarify the state of our record. Mr. Smith made a statement of facts which I think should be a part of the record, namely, as to how it was Mr. Fishgold at first was shaped up, and then, by reason of the protest or intervention of this Selective Service Board in town here, the company gave him work in preference to Jackerson, who had greater seniority; and the further statements made by Mr. Smith that subsequently the Union protested, and the company decided the protest in favor of Fishgold, and subsequently there was this arbitration proceeding by an arbitrator delegated for the purpose by the National War Labor Board with the resulting opinion and award which are attached to the defendant's answer. Now, I think all of that ought to be part of the record.

The Court: It is a part of the record. That is all in the record.

Mr. Goldstein: Is that stipulated?

Mr. Smith: Yes.

Mr. Goldstein: There is one document, if your Honor please, we do not have in the record, which is actually a part and parcel of the arbitration proceeding, and that is the agreement of submission, which poses the question which was decided.

The Court: Who agreed to that?

Mr. Goldstein: The corporation and the Local Union.

233 The Court: The Local Union and the corporation agreed to the arbitration?

Mr. Goldstein: They stipulated what was the question involved and submitted it for determination.

Mr. Durham: My objection to it is that the plaintiff is not a party to it.

The Court: It is not binding and what is not binding cannot hurt.

(Paper received in evidence and marked Exhibit B.)

The Court: Do you rest?

Mr. Goldstein: Just one question, sir. I understand you will consider the copy of the statement of the case and opinion of the arbitrator and award of the arbitrator as being in evidence, a copy of which is attached to
234 the corporation defendant's answer.

The Court: Yes. You can consider them as all being in evidence. You can refer to them in your brief as though they were in evidence. What conclusion I reach from them and what conclusion you reach is another thing. I want everything in the record which anyone thinks will help in this trial. The whole thing is in the record. I do not want to exclude anything which might be helpful. You understand that.

Mr. Smith: That is true, and that is what I want.

The Court: Now the intervenor rests. Is that right?

Mr. Smith: Your Honor, I have not rested.

The Court: No. We are coming to you. The plaintiff has rested and now I want to know if the intervenor rests, and then you will have to rest some time.

Mr. Goldstein: I rest insofar as any possible stipulations for the record can be arrived at. There will have to be proof, both from Mr. Smith's client and perhaps from myself, of the shape-up and the order in which Fishgold was shaped up, and so forth. I take it we are ready to proceed with that. There is also 236
proof to be submitted as to the seniority standing of Jackerson and Fishgold's relation to that.

The Court: The only question is the meaning of the word "shape-up".

Mr. Smith: And the seniority of Jackerson and Fishgold.

The Court: When do you want to proceed?

Mr. Smith: I am ready to go ahead right now. Am I to understand Mr. Durham is not putting Mr. Fishgold on the stand as his witness?

Mr. Durham: He has been on.

The Court: He has been on. You can cross-examine him if you want.

Mr. Smith: May I? 237

The Court: Go ahead.

Cross-examination by Mr. Smith.

Q. Mr. Fishgold, are you still employed by Sullivan Dry Dock and Repair Corporation? A. Yes, sir.

Q. Were you ever discharged by that corporation? A. I was laid off.

238 *Abraham Fishgold—Plaintiff—Cross.*

Q. Do you know the meaning of the words "shaped up" as is used in the shipyard? A. The only thing I do know is when I am not working. You may call it shape up or you may call it laying off, but the fact is I am not working that day or number of days.

Q. But you never call it discharge? A. You could call it a temporary discharge or something around there.

Q. Did your foreman ever notify you that your services were no longer needed? A. He did not.

Q. You were in attendance in the yard? A. For the following days, yes.

Q. For the following day? A. Yes.

239

The Court: The days you testified?

The Witness: Yes.

Q. Most of those days you received what I think is called a shape up slip; is that correct? A. That is right.

Q. I show you this slip of paper with the words marked in capital letters "Shape up ticket." Is that the type of ticket you received (showing paper to the witness)? A. Yes.

Q. I show you this pink ticket marked "Pay off slip." Have you ever received such a slip from any of your superiors at Sullivan Dry Dock & Repair Corporation (showing paper to the witness)? A. I don't recall that.

Q. You do not recall whether you ever received one?

240 A. That is right.

Q. Would you deny that you have ever received one? A. I cannot recall that. How could I ever deny it if I cannot recall it.

Q. Just a moment, Mr. Fishgold. I am asking you the question. Would you deny it? A. I said I cannot recall it.

Mr. Smith: May I ask that the witness be directed to answer the question?

The Court: No. That is a denial, in substance.

Mr. Smith: That is all.

Mr. Goldstein: May I put a question or two, please?

The Court: Yes.

Cross-examination by Mr. Goldstein.

Q. Mr. Fishgold, on these days when you stated that you were not given work, did you go to the United States Employment Service and apply for another job? A. No, I did not.

Q. Did you ask your employer for a release so that you could go and get other jobs? A. I did not need a release, being I am a veteran. 242

Q. Did you ask your employer for a release so that you could get another job? A. I didn't need a release.

The Court: Your answer is that you did not?

The Witness: No, I did not.

Q. Did you consider yourself discharged in the sense of having been permanently put off the payroll of the company?

Mr. Durham: I object to that as immaterial.

The Court: I will let him answer.

A. No. 243

Q. Did the employer continue making deductions for your Social Security and other taxes, income and so forth? A. At the time I was supposedly out of work?

Q. During the weeks in which you lost days from work. A. I guess they did it.

Q. It was shown on your pay check, wasn't it? A. I am saying that. They did.

Q. Then you do not guess. You know that the employer did that, don't you? A. Yes.

244 *Abraham Fishgold—Plaintiff—Cross.*
William H. Leighton—For Defendant—Direct.

Q. What is the usual procedure when a man is discharged in your plant? Have you ever seen a man discharged? A. I really don't know.

Q. Have you ever seen a man discharged? A. No.

Mr. Goldstein: That is all.

The Court: All right. Now, gentlemen, have you any other witnesses?

Mr. Smith: I think that was Colonel Durham's witness, your Honor.

The Court: That is right.

245 Mr. Durham: I have no more witnesses. The plaintiff rests.

The Court: Now it is your turn to proceed.

Mr. Goldstein: I think Mr. Smith will probably be able to save me the job.

The Court: I have to take it in some order.

Mr. Goldstein: I have nothing to prove at this moment until the employer defendant has proved certain things.

The Court: You have nothing at the present time?

Mr. Goldstein: At this moment I do not, sir.

The Court: Now, Mr. Smith, it is up to you.

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246 William H. Leighton, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q. Mr. Leighton, are you employed by Sullivan Dry Dock & Repair Corporation? A. Yes, sir.

Q. In what capacity? A. Welding foreman.

Q. Were you the welding foreman on April 9, 1945? A. Yes, sir.

Q. And at all times since that date? A. Yes, sir.

Q. Was Mr. Fishgold in your department? A. Yes, sir.

Q. Mr. Leighton, have you ever given Mr. Fishgold what is called a shape up slip? A. Yes, sir.

Q. Is this the type of slip that he received (showing paper to the witness)? A. Yes, sir.

Q. That is the form without being filled in by you? A. That is right.

Q. Did you ever give Mr. Fishgold a pay-off slip? A. No, sir.

Q. I show you this pink slip marked "Pay-off slip." Did 248
Mr. Fishgold ever receive that from you (showing paper to the witness)? A. No, sir.

Q. Will you tell the Court whether or not it is your duty to discharge employees? A. Yes, sir.

Q. That is, welders? A. As far as welders are concerned, I can discharge them, yes, sir.

Q. Have you ever discharged Mr. Fishgold? A. No, sir.

Q. Have you ever shaped up Mr. Fishgold? A. Yes, sir.

Q. Is Mr. Fishgold still working for the corporation? A. Yes, sir.

Q. Would you describe for the Court as best you can the meaning of the word "shape up"? A. Shape up is a written notice given to the man during that particular day he is working at his services that we do not have any work available the next day. 249

Q. When is he usually given this shape up slip? A. In the latter part of the afternoon.

Q. Some time in the afternoon? A. That is right; in other words, before he quits for the day he is given the slip.

Q. And that notifies him—is this correct—that his services might not be needed the next day? A. Just for the following day, yes, sir.

Q. Were there ever times, Mr. Leighton, when a shape up slip was given to an employee and his services were needed the next day? A. Definitely.

Q. Would you explain to the Court the procedure involved when a man is handed a pink pay-off slip, and what is the procedure involved after the man is handed the pink pay-off slip? A. The slip is made out according to the form telling the reason why he is paid off, and I sign the name and I send the discharge with this original pink slip.

Q. You mean that pay-off slip? A. Yes. I send him up to the personnel department and from then on he is handled by the personnel.

251 Q. Are you familiar with the procedure beyond that point? A. Yes. From then, before he goes up there, before he gets his pay made out, he has a release from the department and he is sent to the timekeeper and the timekeeper makes out a slip to pay off the man.

The Court: He is discharged, in other words?

The Witness: I give him the discharge. That is right.

The Court: He is discharged permanently when he gets the pink slip; is that right?

The Witness: That is right.

Q. None of those proceedings is involved when a man receives a shape up slip, is that correct, a white slip? A.
252 That is correct.

Mr. Smith: That is all.

Cross-examination by Mr. Goldstein.

Q. Mr. Leighton, the Sullivan Dry Dock & Repair Corporation operates a ship repair yard, doesn't it? A. That is right.

Q. Do you have a steady volume of work in the yard or does your work fluctuate from day to day? A. Since I have been down there for the last four years it has been very consistent, except for maybe one slack period. On the whole it has been very consistent.

Q. Normally in peace time or where you don't have the war rush of work, it has the same characteristics of availability of work as other ship repair yards, doesn't it? A. That is right.

Q. And what is that? Does that mean consistent work for the whole group of employees day in and day out? A. No, not for the whole group. For part of the group.

Q. This shape up, what is it? Why do you shape a man 254
up? A. That is made out in the afternoon previous to the following day. The men are all working at that particular time and as fast as we can find out if the following day we don't have work for say 20 men, we have to give shape up tickets to those 20 men.

Q. What do the 20 men who receive the shape up tickets in the afternoon do the following morning? A. Well, that is up to them, but they usually report to work at the regular time. If there is work, they go to work by regular seniority, but if they don't report for work, we naturally cannot put them to work.

Q. The shape up is merely a notice, then, that on the following day the job on which they have been working won't need them and they are not to report to that job? 255
A. That is right.

Q. If an employee is working in your yard and does not get a shape up, would he the following day report back to the vessel on which he had been working the day before? A. Not necessarily, no.

Q. He would report to whom? A. He would report to the welding department and from there be assigned to his job.

Q. But normally where would he be assigned if he had not received a shape up slip the day before? A. He would be sent back to the same job he had already been on.

Q. In other words, the same vessel which was being repaired? A. Yes.

Q. When he does get a shape up slip in the afternoon of one day, normally he will report the following day, being a welder, at the welders' shanty; is that it? A. That is right.

Q. Who meets him there? A. The foreman or the assistant foreman.

Q. What do they do? A. When the men report they
257 are marked; in other words, the day before the number of men shaped up are down on a separate pad, and as the men are shaped up, as the men come in, they make it a point to show that they are present, and all the men who have not been shaped up go to work, and, if we still have work available, we put men back to work that we gave shape up tickets to, according to their seniority and providing they were to work on time, and so forth.

Q. In other words, when you say "In accordance with their seniority" you mean the man who has been shaped and who had the greatest length of service with the corporation is first assigned to a job? A. That is right.

Q. And then the fellow with the next greatest length of service is assigned, until you have assigned as many of the shaped up men as you have work for on that day? A.
258 That is right.

Q. Suppose there are a couple of men who got shape up notices yesterday afternoon and come in today and you cannot put them to work. What normally happens? Do they come around again tomorrow? A. They usually come back the following day, yes, sir.

Q. And go through the same procedure? A. The same procedure.

Q. Do they have to fill out new applications for employment when they come in after a shape up slip has been given to them? A. No, sir.

Q. Do they surrender their identification badge when they are shaped up? A. No.

Q. They keep that? A. Yes.

Q. Are they required to remove their tools from the yard or from the shop when they are shaped up? A. No, sir.

The Court: It is a temporary matter, the shaping up?

The Witness: That is what it amounts to, yes, sir. 260

The Court: Do you know whether on April 9th, 10th and 11th and May 17th, 18th, 19th, 21st, 22nd, 23rd and 24th this man did not work? He testified he did not. Do you know whether he had work on those days?

The Witness: Some of those days he did not report for work.

The Court: I am not asking you that. I am asking you whether he had work on those days.

The Witness: We can check by the records.

The Court: It seems to me I need some proof here, Colonel, as to whether there was work on those days and when this man was shaped up what the reason for it was. The statute says unless the employer's circumstances have been so changed as to make it impossible or unreasonable to do so. Suppose on those days, Colonel, the Sullivan Shipyard had 20 welders working and suppose all 20 of them were world war veterans of World War II who have been in the army longer than he was. Would they be justified in shaping him up? 261

Mr. Durham: If all of them were World War veterans?

The Court: I have no proof showing that they were. I would have to have some proof explanatory of that last section.

Mr. Durham: There is one man here and I understood Mr. Smith was going to produce some evidence about him, this man Jackerson, who was a non-veteran. Now, this claim that Jackerson——

The Court: Was Jackerson working those days? I need some proof.

Mr. Smith: I would like to put in evidence these slips.

The Court: Yes.

(Shape up ticket and pay-off slip received in evidence and marked, respectively, Defendant's Exhibits C and D.)

The Court: Are you going to put Jackerson on?

Mr. Smith: I have his seniority list here and the head of the personnel department.

The Court: Suppose you go over that and we will take it up tomorrow morning. I need some proof as explanatory of that part that says that "Circumstances have so changed as to make it impossible or unreasonable." You need some proof on that in order to sustain your cause here.

Mr. Durham: I thought we had stipulated the plant was at work on those days.

The Court: They might have been all World War veterans with more service than him. He has a list of the men who worked those days. I am going to adjourn until 10.30 tomorrow morning. I would suggest that this afternoon you try to arrange a stipulation and, if you cannot, you will have to call personnel to prove there were men working that day who were not veterans or that he was senior to, because he was a World War veteran.

Mr. Smith: We can stipulate Jackerson was not a World War veteran.

The Court: Will you stipulate Jackerson was not a World War veteran and that Jackerson worked on all the days that this plaintiff did not work?

Mr. Smith: That I would have to check.

The Court: You need that.

Mr. Goldstein: May I interrupt just for a moment?

(Mr. Goldstein confers with Mr. Smith.)

Mr. Durham: That is not really my proof.

The Court: Yes, it is. You carry the burden of proving every part covered by the statute. Will you stipulate that in those days there were non-veterans working in that particular department that Fishgold worked in? 266

Mr. Smith: I so stipulate.

Mr. Goldstein: There is one further question we want stipulated. If your Honor please, I think the stipulation will cover our position perfectly if there are no further factual matters.

Mr. Smith: I still have one witness to put on.

Mr. Goldstein: We can get one further concession on that on the record, that G. Jackerson, who was one of the non-veterans who had work on the days Mr. Fishgold, the plaintiff, did not, was hired by the company on November 25, 1942. The plaintiff Fishgold was hired by the defendant corporation on December 21, 1942. 267

Mr. Durham: I would like to get into that last stipulation that those men, the non-veterans, were doing comparable work that Fishgold was doing.

Mr. Smith: It is so stipulated.

The Court: It is assumed they were doing the same kind of work that Fishgold would have done if he had worked.

Mr. Smith: Yes, your Honor.

268 *Fred Beattie—For Defendant—Direct.*

FRED BEATTIE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q. Mr. Beattie, how long have you been connected with the ship-repair business? A. I have been in this particular plant 26 years.

Q. 26 years? A. Yes, sir.

Q. Did you spend any time prior to that in the same business? A. Yes. I was five years on the other side and ten years sailing engineer.

269 Q. Are you a licensed engineer? A. Yes, sir.

The Court: Are you calling him as an expert?

Mr. Smith: I want to show his background, because I intend to show the background of the meaning of this word "shape up" and the reasons for it.

Q. Mr. Beattie, what is your position at the present time? A. Vice-president and general manager of the Sullivan Dry Dock Company.

Q. The defendant corporation? A. Yes, sir.

Q. Mr. Beattie, will you define for the Court the meaning of the word "shape up"? A. Shape up is the method through which we hire or dispense with the services of any man on any given day.

270 Q. Can you explain a little more specifically the procedure that is followed? A. Well, say a man is working today, or has been working for several days, on a particular job. The foreman has knowledge that that job will not be in existence the following day. He gives that man a shape up ticket which informs the man, if it does not so say the words, that his services will not be required the next day.

Q. How long to your knowledge, Mr. Beattie, has this system been in existence in the shipyards? A. It has al-

ways been in existence since I have come to this port 26 years ago.

Q. Is that system in all repair yards? A. Yes, that system is prevalent throughout the port.

Q. Can you give the Court some idea of the necessity for retaining such a system? A. At this particular time, if men come down to work the following morning and they do not shape up, they get stand-by pay for appearing at the plant. That avoids that charge. When we shape a man he can take a day or a couple of days off without appearing at the plant.

Q. Why do we have such a great fluctuation in the number of employees working on a particular day? A. That 272
is governed by the number of ships that come in or do not come in to any given plant.

Q. Is there a great fluctuation in the amount of ships? A. Yes. These days a convoy may be due to arrive and the convoy may be diverted, which has caused a great number of shape ups in a plant.

Q. Did that trend exist during the period involved in this case? A. It did.

Q. That is, in April and May of this year? A. Yes.

The Court: What I want to know is who does the shaping up and how it is arrived at. He wants 20 men tomorrow and he has got 60 today. He lets off 40 for tomorrow. How does he pick the 20 to come in and the 40 to be left out? 273

The Witness: He picks the 20 best suited for the work which he knows will be performed the following day.

The Court: In other words, if he needs 20 men tomorrow and he has 60 men today, he picks the 20 he thinks best suited for that work?

The Witness: The seniority is quite important and also the ability.

The Court: During this period of time did you g any notice from the Selective Service that a war Ve eran had to be given work? Did you give any thoug to that?

Mr. Smith: If your Honor please, Mr. Beattie do not do the shaping up himself.

The Court: You know something about what th policy of the company was?

The Witness: Yes, sir.

The Court: Did you give any thought to that clause

The Witness: That particular method was handle by Mr. Smith himself.

275 The Court: You did not handle that part?

The Witness: No.

Q. Mr. Beattie, in the case of the plaintiff, Mr. Fishgold did he receive every right that he would have receive had he not gone into the service?

The Court: If he did not shape him up, how coul he answer that?

Mr. Smith: He might know whether or not he re ceived his rights.

The Court: Any knowledge he has gained would b second handed. (Addressing the witness) Did yo shape him up?

The Witness: No, sir.

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Q. Before Mr. Fishgold went into the service, was th shape up conducted in a similar fashion? A. Yes, sir.

Q. The same reasons for men being shaped up?

The Court: We know all about being shaped up We have been hearing about shaping ups here for 2 years.

Mr. Smith: I want to show your Honor that before this plaintiff went away we did the same thing as we do now. 277

The Court: I have no doubt about the sincerity of the company in shaping up. The trouble is that we have a statute which we never had before. I know you have the contract with the Union on the one hand and you had the section on the other hand.

Mr. Smith: I am through, your Honor.

Mr. Durham: I have rested.

Mr. Goldstein: I take it the plaintiff has rested and the corporate defendant has rested.

The Court: That is right. Have you any proof? 278

Mr. Goldstein: The parties I represent will rest without submitting proof other than that already in the case.

The Court: Now you can make any motion you want.

Mr. Smith: I move to dismiss the first cause of action on the ground the plaintiff has failed to prove a prima facie case, and in that connection, your Honor——

The Court: I wish you would reserve all argument.

Mr. Smith: I want to call your attention to one case. I do not intend to argue either of the motions.

The Court: I will give you the chance, but I will tell you this is the way I am going to do it and then you will see what I mean. Off the record. 279

(There was discussion off the record.)

The Court: The motion is denied.

Mr. Smith: I make the same motion with respect to the second cause of action.

The Court: Denied.

Mr. Smith: I want to call your Honor's attention to the case of Kay against General Cable Corporation.

280 *Motion to Dismiss.*

That is 59 Fed. Supp. 358. In that case Judge Meaney decided——

The Court: Have you any motion?

Mr. Durham: All I ask is the relief asked in the complaint.

The Court: Have you any motion?

Mr. Goldstein: Yes. I move to dismiss the complaint both as to the first cause of action and as to the second cause of action on the ground respectively for each cause of action that neither the allegations nor the proofs have demonstrated the existence of a cause of action.

281 The Court: Denied.

Mr. Goldstein: Exception.

The Court: When do you want to submit briefs?

(There was discussion off the record.)

The Court: I go on vacation on the 30th. If you give me briefs on the 27th, I wish you would all appear here on the 30th and I will give you my decision. All briefs on the 27th; on Thursday, the 30th, at 10.30, the decision.

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Hearing of August 29, 1945.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

United States Court House,
Brooklyn, N. Y.,
August 29, 1945.

Before: HONORABLE MATTHEW T. ABRUZZO, U. S. D. J.

APPEARANCES: 284

KNOWLTON DURHAM, ESQ., Attorney for Plaintiff.

J. READ SMITH, ESQ., Attorney for Defendant.

H. H. GOLDSTEIN, ESQ., and HERMAN ROSENFELD, ESQ., Attorneys for Industrial Union of Marine Shipbuilding Workers of America, and Local 13, an affiliate.

HAROLD CAMMER, ESQ., Attorney for Congress of Industrial Organization.

The Court: What I wanted was this: On April 9th, did you have welders on the job that day who were junior in point of employment to this plaintiff Fishgold and who started to work for your company after the date he started to work? 285

Mr. Smith: No, we did not. We had no junior welders.

The Court: I do not mean junior welders.

Mr. Smith: No welders junior to Fishgold in seniority.

The Court: They had all worked there before he came to work there?

Mr. Smith: That is correct.

The Court: On any of these days, did you have any men working who started to work after Fishgold?

Mr. Smith: On none of the days.

The Court: I am afraid I want your books on that. I want the name of every employee and the date he started to work.

Mr. Smith: I have them available for your Honor in court this morning.

The Court: How many welders did you have on the 9th of April?

Mr. Smith: I would have to check that, your Honor.

The Court: Well, that is the point.

Mr. Smith: I did not know you wanted to know how many we had.

287 The Court: Certainly. If you had 30, how do you know that the 30 of them started to work before Fishgold did unless you can give me the dates of their employment?

Mr. Smith: I can give them to you. We have seniority lists that are issued periodically.

The Court: I do not care about seniority lists. I want to know the date when each man started to work.

Mr. Smith: This list shows the date each man started to work. That is how they are placed on the list.

Mr. Goldstein: Are you prepared to present evidence this morning, Mr. Smith?

Mr. Smith: I am.

The Court: All right. Fishgold, come to the stand. He has been sworn.

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ABRAHAM FISHGOLD, recalled, having been previously sworn, further testified as follows:

By the Court.

Q. On the days you reported for work and did not get any work, did you see any welders who were working there who came to work after you originally started with

this company, Sullivan Dry Dock? Do you know what I mean? A. I know what you mean, but it is a complicated answer for me to give you. You see; it works where all the welders come in and they stand around according to seniority rights, which they don't follow in practice.

Q. You are getting into a treatise. That is the trouble. I have gotten too much of that and very little of what I want. I want to know what date you started to work for this company? A. The 21st of December, 1942.

Q. Now, you know what men were there on the 21st of December, 1942; what welders. Is that right? A. Approximately.

Q. About how many were there then, approximately? 290
A. Well, roughly; I would say approximately 100 or 120, or something around there.

Q. You could not tell them all, could you? A. No, I couldn't.

Q. Now, on the days you reported to work there, did you see any men who had been taken on the job, so to speak, after January 1, 1942, or the date you started to work? A. Yes, I have seen several men who started to work after me.

Q. And you saw them there on the days that you did not get work; is that right? A. (No answer.)

Q. You say that there were nine days you were not given work? A. That is right.

Q. Were any of those men who came to work after you started to work in 1942 on the job on those days? Did you 291
see them on the job? A. No, I didn't see them. I mean I have no way of checking that.

Q. Well, you saw which men went in to go to work, didn't you? A. Yes, I have seen which men went in to go to work.

Q. Did you see any of the men who came after you go in to the job on those days? A. No, I did not.

The Court: Mr. Smith, you told me differently on the telephone the other day.

Mr. Smith: Your Honor, I said it could happen on occasion that if Mr. Fishgold did not show up for work a man with less seniority——

The Court: Now, look. I am going to stop being confused in this matter. The answer to my question is a very simple one. How many welders did you have on the job on April 9th?

Mr. Smith: I will check it if you give me five minutes, your Honor.

The Court: Yes. I told you that two days ago.
293 It is a very simple question. I am not going to have any general answer on this; it is too important.

Mr. Smith: Your Honor asked me to be ready to offer proof to show the welders who worked on this particular day and whether or not they had more or less seniority than Mr. Fishgold.

The Court: That is right.

Mr. Smith: And I am ready to prove that. As far as the numbers are concerned, I did not make a list of them, but I can check them from my files in a few minutes.

The Court: Mr. Durham, this is your burden and not mine. You ought to be ready both ways in this case. You have been ready only on one way. You take the broad position that the statute says he is senior to
294 everybody. Suppose I find he is not. Suppose I find he is senior only to the people who came after him. Where is your proof as to this record in that? On an important question like this it is very important counsel have the case prepared both ways.

Mr. Durham: I take the point he is senior to all non-veterans.

The Court: Suppose I do not agree with you. You are out, aren't you?

Mr. Durham: Yes.

The Court: Supposing there were men on the job on those days junior to him. Where is there any proof of that fact? Why weren't you prepared on that point, too?

Mr. Durham: Because I am only interested in this case in proving, in establishing, that the act, Section 8 of the Act, gives him this guarantee of employment over non-veterans.

The Court: All right. Supposing I say you are wrong. You are out, aren't you?

Mr. Durham: Yes.

The Court: Supposing there were men on the job on those days who were junior to him? You might be in, might you not? 296

Mr. Durham: In so far as establishing his right to damages, yes. I would not have any interpretation of the meaning of the act.

The Court: Yes, you would. I might not agree with you, but you would have my interpretation. Now he is going to give me a resumé of the books without you looking at the books. I told him what I wanted. It was said here last week that Mr. Smith—I do not know what Mr. Smith was meant—had the shaping up system in his hands, that he was the one who put the welders to work or not to work. To what Mr. Smith does that refer?

Mr. Smith: I am labor relations counsel for the company, your Honor, and I decide policy regarding shaping up for the company, but the foremen themselves personally work the shape up. 297

The Court: What foreman was on the job these nine days?

Mr. Smith: Mr. Leighton, who is here in court today.

298 *William H. Leighton—By the Court—Direct.*

The Court: All right. Put him on the stand.

Mr. Smith: I have those figures for you, your Honor.

WILLIAM H. LEIGHTON, recalled, having been previously sworn, further testified as follows:

The Court: Let me have these dates.

Mr. Smith: These are the figures, your Honor (handing papers to the Court).

299 *By the Court.*

Q. Were you the foreman on April 9, 1945? A. Yes, sir.

Q. How many men did you have working as welders on that date? A. It is right on that sheet. That is the accurate count.

Q. From where did you get this sheet? A. From my daily work books, which I have here.

Q. Look at your daily work books, and tell me how many men you had working for you as welders that day. A. On April 9th, your Honor?

Q. Yes.

The Court: What is the date of Fishgold's employment?

300 Mr. Durham: December, 1942.

Mr. Goldstein: December 21, 1942.

A. Approximately 48 men.

Q. Do you know each and every man's name? A. Every one. I have them right here.

Q. Do you know, as to each and every man, what date he first came to work with your company? A. That is right.

Q. Was there any man of that 48 who came to work for you after December 21, 1942? A. No, sir. They all came prior to that date.

Q. All right. I want you to make a list of every man and the date he came to work for you. Now, where did you get the date he came to work for your company for the first time? A. That date comes off our seniority list, which is based mainly on the starting date of the individual.

Q. I am not asking that. Where do you get it from? A. From our personnel department. That sheet is made up and that sheet is passed out to the different departments. 302

The Court: I want that certified.

Mr. Smith: I have it certified and I have the personnel director——

The Court: I do not want the personnel director. I want your books. I want each and every man's name and address and the date he started to work, with either a certification or some man ready to swear to it under oath.

Mr. Smith: I have everything but the address here. I have someone ready to swear to it under oath.

The Court: Have you got it all written out?

Mr. Smith: Yes, your Honor, I have.

The Court: Ready to put it in evidence?

Mr. Smith: I have. 303

The Court: All right, bring that here. This man only knows what is given to him?

Q. Is that right, Mr. Leighton? A. That comes down from the personnel department, the starting dates, yes, sir.

304 *Peter J. Boylan—By the Court—Direct.*

PETER J. BOYLAN, called as a witness by the Court, having been first duly sworn, testified as follows:

By the Court.

Q. Have you brought with you a sheet for April 9, 1945, indicating how many welders were on the job that day, with their names and addresses? A. I do not have the names and addresses.

Q. Have you the names? A. I have the names and numbers.

Q. In other words, the numbers and the dates they first started to work with your company? A. Yes, sir.

305 Q. Will you hand me that sheet for April 9th? You had better take them apart, because I want just the sheet for that one day.

Mr. Smith: Your Honor, that list is current all the time. If the list were made up today it would show the same thing regarding any employee's seniority as of April 9th.

Q. Give me the list of April 9th. You have given me 15 or 20 sheets. That is not what I want. I want the one sheet of April 9, 1945.

Mr. Smith: Do you want the welders who were
306 working that day, your Honor?

The Court: He knows what I want.

Q. I want the names of the men who worked on April 9, 1945, together with the dates that they first started to work. Now, that is a very simple question and I want nobody to interfere. A. Your Honor, that would have to be a list made up separately.

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The Court: Mr. Smith, do you want me to put the burden of this suit right on you? Do you want me to give you a decision that the company, who is supposed to have come in here with the information that the Court wants, had not? Do you want me to shift the burden to you?

Mr. Smith: No, your Honor.

Q. I want a certified list or your testimony of the name of every man who was working on April 9th, and the date he started to work for the company. Can you give me that? A. I will have to go back to the office.

Q. All right. I want it here at half past three. I want 308
the names of the men who worked. The last witness said there were 48 welders working that day. I want 48 names, together with the date that each man started to work, and I want you or somebody prepared to swear that that list is correct under oath. A. That is for April 9th?

Q. April 9th, and I will give you the other dates, too. April 9, 1945. Now, the next day he did not work was April 11, 1945.

The Court: Is that right? Correct me, gentlemen, if these dates are wrong.

Q. (Continued) May 17th. These are all 1945. May 18.

The Court: Are these the dates, Mr. Durham, that 309
you claim?

Mr. Durham: Yes, sir.

The Court: Will you call off the dates you claim? May 18th?

Mr. Durham: May 18th.

The Court: May 19th?

Mr. Durham: 19th and 20th.

The Court: May 20th was a Sunday.

Mr. Durham: That was Sunday. That is out. May 21st, 22nd, 23rd and 24th.

Q. Those are the dates I want. Every man who worked on those dates and the dates they started to work for the company. A. Your Honor, can I have those sheets back?

Q. Certainly. Now I want you to tell me, too, if any of these men whose names you give me as working on those dates were steady employees or were they men who worked now and then. Do you understand? A. I understand.

Q. I want you to look at your books and tell me whether they worked right along or whether there was any gap in their days of work. Do you understand that? A. Yes,
311 sir. Do you want all this by half past three?

Q. Yes, sir. It can be done by half past three. A. We have to investigate every man.

Q. That is what I want done.

Mr. Goldstein: Over what period of time is that, your Honor?

The Court: He knows. He knows the difference between a man who works every day and a man who works two or three days and then somebody else works two or three days and somebody else works two or three days.

Mr. Goldstein: That might very well depend, sir, on the period of time over which you measure the
312 regularity of work. It might be in the last six months a man worked regularly and prior to that irregularly.

The Court: I am a little bit stupid. But bear in mind I am the man who writes the decision, and Mr. Smith told me something the other day on the telephone which he is not adhering to today.

Mr. Smith: I have in court today, your Honor, a record showing the names and the dates of employment of every welder in our yard.

The Court: Did you tell me the other day, when I asked you to bring the information to me, that you would be ready to stipulate this morning that there were men working on the dates that Fishgold did not work who were junior to him? Yes or no?

Mr. Smith: Your Honor, I said the records might indicate that. I had not looked up the records.

The Court: Did you tell me you were ready to come here and stipulate to that fact? Yes or no?

Mr. Smith: Your Honor, I cannot recall it.

The Court: You cannot recall what you told me.

Mr. Smith: I recall saying that they might indicate that. If your Honor please, I have this morning— 314

The Court: I am going to tell you something. Before I render a decision in this case, if I do not get the information I want, I am going to make you bring everything you have here, Mr. Smith. So do not try to play fast and loose with me.

Mr. Smith: Your Honor, I am not trying to play fast and loose with you.

The Court: Wait a minute. And if you irk me too much I am going to write you a decision that will put the burden right squarely in your lap and then let you reverse it. Now, I want the thing right. I have been trifled with a little bit here and I do not intend to be trifled with.

Mr. Smith: It was entirely unintentional, your Honor. I have been trying to give you any information you want and I intend to from now on. 315

The Court: I will get it anyhow, even if I have to put my own accountants in here.

Mr. Smith: May I suggest we might avoid this session this afternoon? I have in court here two different records. We have one record which indicates the name of the man, his date of employment and his

number, and we have another record which indicates whether that man worked on the days that Fishgold did not work, and if you examine the two records together you can get the answer you are looking for, but part would have to be taken from Mr. Boylan and part from Mr. Leighton, the foreman. I think I can bring it out for you if you let me do it.

The Court: I am afraid you do not follow me. Supposing you had 48 welders on the 9th. Supposing one man there started to work 15 years ago, and suppose for 10 years he did not work for you and he came back 5 years ago and then for 3 years he did not work
317 for you, and then he came back about 6 months ago, which would be after Mr. Fishgold's employment. Do you think I am going to take your date of 15 years ago and say that is the date of his employment? That is exactly what I told you I wanted, but you did not follow me. I know these men are in and out. I know these men go on longshore duty and welders go with you and they go with another company. But that is not a steady, permanent employment and you are not going to make a man senior to Fishgold because his date was 15 years ago. Do you get my point?

Mr. Smith: I understand now, but I did not understand before.

The Court: You understand it now, don't you? Each man who worked the 9 days that Fishgold did
318 not work, I want to see if he was a permanent, steady employee or whether you are giving me a date of seniority some 10 years back. For 9 years of them he might have been working for Todd Shipyard, for all I know, and, if necessary, I will bring every one of the 48 witnesses here and ask them where they worked all the time. Now, did you want me to go into that?

Mr. Smith: We couldn't tell all that ourselves. I will bring you the actual employment card, the original card which shows when a man comes with the com-

pany and when he leaves and when he comes back, but it does not show daily. If a man is out a week or two here and there it would not show that. In fact, I have the records here of how many men worked, how they were shaped and what days they worked.

The Court: Give me the record of each man who worked for the nine days Fishgoid did not work. I want you to show me whether he had steady employment or spasmodic employment.

Mr. Smith: I can show you the card. Whether it was steady or spasmodic will have to be determined by your Honor. So I do not misunderstand you again, you want the original employment card which shows when he was employed and whether he left our employment and came back. 320

The Court: Yes.

Mr. Smith: You also want our record which indicates the actual men who worked on those particular days.

The Court: Those nine days. That is right.

Mr. Smith: Other than the original cards, I have all of the records here.

The Court: Well, you bring them here.

Mr. Goldstein: May we ask your Honor's indulgence on that half past three? I came rushing in——

The Court: No. This does not concern you.

Mr. Goldstein: It concerns us very fundamentally.

The Court: And if you are not here it does not hurt you, except you can cross-examine on it. I am going to take it at half past three. 321

Mr. Goldstein: We all have to be here again tomorrow.

The Court: I may want something else tomorrow. Off the record.

(There was discussion off the record.)

The Court: Half past three.

(A recess was taken until 3:30 P. M.)

(In Chambers)
United States Court House,
Brooklyn, New York,
3:30 P. M., August 29, 1945.

(Met pursuant to recess.)
(Appearances as heretofore noted.)

PETER J. BOYLAN, recalled, having been previously sworn, further testified as follows:

By the Court.

323 Q. Have you got the records for the 9th of April? A. We have all the records and we have them segregated on different lists.

Q. For what days have you got the sheets? Give them to me one at a time. A. They are all the days, and here are all the records here.

Q. April 9th you have from numbers 1065 to 1106, and then there are other numbers in here, a total of 46 men: is that right? A. That is right.

Q. You said 48 this morning. A. I think he said approximately 48.

The Court: Did you say 48?

Mr. Leighton: I said approximately 48. I counted
324 them roughly in the book. There may be a repeat of a few.

The Court: On your book you have 48?

Mr. Leighton: No. I said approximately 48.

The Court: Well, count them in your book.

Mr. Smith: That was supposed to be taken from his book. That is where he got that list.

The Witness: 46.

Q. Now, you have got the records for April 10th, May 17th, 18th, 19th, 21st, 22nd, 23rd and 24th: is that right? A. That is true.

Q. Now give me the cards for April 9th, at the moment. A. Well, your Honor, these cards, where you see a bunch of men here, they will also be duplicated here.

Q. Each man has a number, hasn't he? A. That is right.

Q. And you have given me the numbers and the dates; is that right? For April 9th you have given me 46 different men who have numbers from 1065 up; is that right? A. That is right.

Q. You have done the same thing for the 10th; is that 326
right? A. That is true.

Q. The bunch of cards you have in your hand, do they cover every number for those nine days? A. Every number, yes, sir.

The Court: Mark those in evidence.

(Cards received in evidence and marked Court Exhibit E.)

Q. What was Fishgold's number?

Mr. Smith: If your Honor please, if they are going to be kept for any particular time, may we have the right to substitute photostatic copies?

The Court: I will keep them only one day. 327

Mr. Leighton: 1804.

Q. Fishgold's number is 1804; is that right? A. That is right.

Q. Does each man get a number as he comes in? A. As he is hired he is assigned a number.

Q. And you do that in chronological order? A. That is true.

Q. So that if a man has a number 1803, he would be one senior to Fishgold; is that right? A. No; it would not work out that way, your Honor. If we had a man who worked on 1803 prior to him and he left our employ and that number was open, we would assign it to a new man.

Q. Is it fair to say that any number after 1804 would be an employee who came after Fishgold? A. No. He may come before Fishgold. They are all mixed up. For instance, 1805 may have started before Fishgold.

Q. I am taking the first one, 1065. He left on July 31, 1945, for the service; is that right? A. That is right.

Q. Now, the date on the left here, 5/20/41— A. That is the day he started.

Q. That is the day he first started with your company; is that right? A. That is right.

Q. Up to the time he left in 1945, the card does not show how many days he worked, or how often he worked, or how steadily he worked? A. No, but this is an indication here. May I just turn this over? On this card we list all our vacations. If a man received a vacation each year you can rest assured he worked pretty steady. He had to have a required number of hours to receive a vacation.

Q. In other words, where there is a vacation card, that man has worked fairly steadily during the year that he is given a vacation. I see you have got 40 hours in 1942. A. That is what they are paid, 40 hours.

Q. And here 48 hours. A. We increased the vacation. You will only see that in a set up like this, where a man left our employ, but we won't have the rate card attached for a man still in our employ.

Q. Now, take the next one, 1133. 1133 is James J. O'Connell. He started on 4/18/41; is that right? A. Yes, sir.

Q. Then you have 6 23 41. What does that second date mean. A. Increase.

Q. That is when he got his increase? A. The increases as you go along and when he got them.

The Court: The plaintiff's date of employ was December 21, 1942?

Mr. Goldstein: That is right.

Q. Now, this card does not show how steadily he worked, does it? A. That man is one of our old employees. He is still in our employ.

Q. That may be, but the card itself does not show how steadily or unsteadily he worked. A. If he lost any amount of time, especially more than 90 days, it would be marked on there and then he would be considered a new employee, but from time to time men are sick and ask for a leave of absence, and those things are not kept record of.

Q. I just want to get the form. Did your company employ any new welders after this man left? A. Do you mean the day he was shaped up?

Q. No. Did any welders come for the first time to work for your company after Fishgold on December 21, 1942? He came to work for you that date? A. Yes. Did we employ any welders?

Q. After that date. A. Oh, yes; hundreds of them since December 21, 1942.

The Court: Have you a payroll sheet for those nine days to show whom you paid?

Mr. Smith: We have a payroll record. We have a thick book. We had as high as 3,000 employees.

WILLIAM H. LEIGHTON, recalled, having been previously sworn, further testified as follows:

By the Court.

Q. For each one of these days, your book contains numbers of the men who worked? A. Yes, and what job they worked on.

Q. These are just welders; is that right? A. That is right.

Mr. Goldstein: May I suggest we note on the record Mr. Leighton is now testifying?

The Court: Yes, Mr. Leighton is now testifying.

Q. Where does April 9th start? A. Right here (indicating).

Q. What does this mean, "Pike 1031"? A. That is the name of the boat and that 1031 means he was used as a snapper on this job.

Q. Then you have others than welders in this book? A. He is a snapper.

Q. Snapper and welder? A. He does not do the same duty. The welder does the job and the snapper is responsible for that job.

Q. He is the boss on that particular job? A. Yes.

Q. In other words, 1031 is the snapper? A. That is right.

Q. And the other numbers of the welders? A. The welders who worked.

Q. Who worked on that day? A. That is right. Like on that particular day on this sheet here there are five snappers. They are not on the list, but they are in the book; five different snappers.

The Court: Have you gone through these records, Mr. Durham?

Mr. Durham: I went over to the yard and looked at the cards.

The Court: Let this book be marked in evidence.

(Book received in evidence and marked Court Exhibit F.)

The Witness: This one here is a continuation which covers those dates in May.

The Court: Mark both of them.

(Book received in evidence and marked Court Exhibit G.)

Q. Look at this typewritten sheet. You have "Pike 1031". A. 1031 is the snapper. 338

Q. You have that number in your book, haven't you? A. Yes.

Q. Is that one of the 46 that you counted? A. No. These 46 are the actual welders.

Q. I am not concerned with that. Is Pike a welder; yes or no? A. Pike is the name of the boat and 1031 is the snapper who bosses those men and his number is not on that sheet.

Q. The number is not on this sheet, although he is a welder or a boss welder? A. He is a boss welder, but he does not perform the duties of a welder.

Q. Is every number on this April 9th sheet one of the 46? A. Yes.

Q. Or have you more than 46 numbers there? A. There are more than 46 numbers, but those are the snappers. 339

Q. How many snappers did you have on that day? A. We had five on that day.

Q. And they are boss welders? A. That is right.

Q. And their numbers do not appear on this April 9th sheet? A. No, their numbers do not appear on the sheet as a welder.

340 Q. Pick out the other four. A. 1195, 1031; Fletcher, 1120; Worth, 1125 and 1000.

Q. Do you know when they came to work with you? A. Definitely.

Q. What date they came to work? A. We have those cards right here. On a different date some of these men had to go back as a welder, and all these men who are snappers on these different dates; if they don't appear on here as a snapper, their cards are still in there to cover their starting time.

341

PETER J. BOYLAN, recalled, having been previously sworn, further testified as follows:

By the Court.

Q. Now, Mr. Witness, from what did you take this typewritten record? A. This record was made up from the lists submitted to me by the foreman who checked in the man who worked on that day, aside from the boss welders or snappers here as just mentioned.

Q. Is there any book that showed what welders were paid on April 9th, the number of welders who were paid, and how many? The payroll book would show, wouldn't
342 it? A. The payroll will show that, yes, but that is quite large.

Q. It is a large book. I know that. But doesn't it show just what welders were paid and how much each one was paid? A. It does. It shows the hours they worked on each day, but then we total the hours at the end of the week, so much per hour and so many hours, and give him a total.

Q. When did you make up this typewritten sheet? A. This afternoon, at your request.

Q. Did you make it from these cards? What did you make this typewritten record from? From what record did you take it? You did not draw it from memory, did you? A. No, sir.

Q. From what book did you take it? A. From the lists submitted to me by the foreman, Mr. Leighton, which he obtained from his book record, which is the actual record of the men who worked on those days in question.

Q. That is, these books in evidence now; is that right? A. That is true.

The Court: Are there any other questions you want to ask? 344

Mr. Goldstein: May I suggest you identify the typewritten sheets for the record?

The Court: The exhibit numbers show that.

The Clerk: Exhibit H.

Mr. Goldstein: The sheet is H and the two books are F and G, respectively.

The Clerk: That is right.

(Typewritten sheets received in evidence and marked Court Exhibit H.)

The Court: I want to call your attention to the fact that, just looking at these cards superficially, without doing much more than that, I find that there are three names on the book which the foreman gave me, Worth, Fletcher and Pike, for whom there were no cards presented. 345

Mr. Leighton: They are ships, your Honor.

The Court: The numbers are not on these cards, either.

Mr. Goldstein: If your Honor please, may I cross-examine the witness on this matter?

The Court: Yes, you can cross-examine if you want to.

Mr. Goldstein: Or may I cross-examine Mr. Leighton? I think that would be the best way to establish it.

The Court: Get through with Mr. Boylan first.

Mr. Goldstein: I have no questions to ask Mr. Boylan.

The Court: Colonel, have you any questions?

Mr. Durham: Yes.

Cross-examination by Mr. Durham.

Q. Mr. Boylan, am I correct in my understanding that
347 the cards which you have produced are the cards of all the welders who worked at the defendant's plant on these nine days when Fishgold, the plaintiff, was shaped up? A. That is true.

Q. That is correct? A. That is right.

Q. Do you know whether any of those men were veterans who had been discharged from the Armed Service and had been restored to work? A. Any of these men mentioned on the cards?

Q. Yes. A. I did not scrutinize the record that closely, but if they were, it would be marked on the card if they were a returned veteran.

Q. Could you tell me that? A. I would have to go through all the cards and see.

Q. Will you do that before we adjourn today? A. As
348 soon as his Honor will let me have the cards, I will look the cards over. We marked every card as a man returns to work as a veteran. He has to submit to us his discharge papers.

Q. I would like to have that in the record.

The Court: I can tell you this: The cards show the man went into the service. They do not indicate

whether he came back from the service or not, as far as I can see.

Mr. Durham: As I understand the witness, if they do not show that, then he is not a veteran.

By the Court.

Q. Is that what you mean? If the card does not indicate he came back as a veteran, then you would say he was not a veteran? A. I would say he is not a veteran, from memory. Now, it may be——

Q. There may be a mistake in a few? A. He may have gone into the service in the early part of 1942 and came 350
back to us as a new employee. I don't know that. He might have been in the service and discharged, say in October of 1942, and that is prior to Fishgold's employment with us. He may have been a veteran for those number of months—we don't know that—but he came to us as a new employee and we put him on as a welder.

By Mr. Durham.

Q. That could be, but it would not be very likely, would it? A. It has happened. We have some men down there like that. Who they are I cannot tell. But definitely, if a man was in our employ and left our employ to go into the armed service and came back to us like Fishgold did, the card would be so marked. 351

Q. Will you look at the cards before we adjourn today and later on just tell us? A. I will, yes, sir.

Q. Whether any of those men are discharged veterans. A. Yes.

Mr. Durham: That is all, your Honor.

Mr. Goldstein: May I recall Mr. Leighton?

The Court: Yes.

WILLIAM H. LEIGHTON, recalled, having been previously sworn, was further examined as follows:

Cross-examination by Mr. Goldstein.

Q. Mr. Leighton, I show you this stenographer's note book which has been marked in evidence as Court's Exhibit F. I have turned to the page which, at the top of it, has a notation "April 9." I take it that refers to April 9, 1945? A. That is right.

Q. Now you have, as the first entry in the left-hand column, the word "Plate". What is that? A. That is the position of the job. In other words, that is the plate shop.
353 In other words, where all these welders are working.

Q. Alongside of the word "Plate" you have a number, 1195. What does that mean? A. That is the number of the snapper who has charge.

Q. On the very next line you have a series of numbers, beginning with 1065, and 1133, and so forth. What are those numbers? A. Those are the welders' numbers.

Q. Who were actually at work? A. Who actually did the job; that is right.

Q. Two lines before the line on which appears the word "Plate" and the number "1195", there is a number "1875", which has a penciled oblong drawn around it. What does that indicate? A. That indicates that he started a job at the plate shop.

354 Q. That is, 1875 started a job? A. He started at the plate shop and that little notation there, that square——

Q. The "9:30" above what you call a square and what I call an oblong shows the time of day at which what happened? A. That man there was put on another job.

Q. At 9:30 A. M.? A. Approximately 9:30.

Q. In the right-hand column, on the first line under the date, you have the word "Pike". What does that mean? A. That is the name of a ship.

Q. On which work was being done? A. That is right.

Q. Alongside of that word "Pike" you have the number "9031". What is that? A. That is the snapper.

Q. Who had charge of the welders upon that vessel? A. That is right.

Q. On the very next line you again have a number which is blocked off in a penciled oblong, with "9:30" just above the oblong. Does that mean the same thing as was meant in the left-hand column? A. All those squares or oblongs, mean the man has changed the job during the day.

Q. And wherever you have such a square or oblong on the page—. A. He has changed the job the same day.

Q. On the line just below the line which carries the name "Pike" you have a series of numbers, and so do you have on the next line and on the next line. What are those numbers? A. Those are the numbers of the welders who welded on that job. 356

Q. By "that job", you mean on the Pike? A. On the Pike.

Q. The next line after that series of numbers contains the word "Fletcher" and, alongside of it, the number "1120". Will you explain what that means? A. The Fletcher is the name of a boat and "1120" is the snapper on the boat.

Q. And underneath that the numbers that appear in the following two lines are the numbers of the welders who worked on the Fletcher? A. That is right. 357

Q. On that day? A. On that day.

Q. Below that you have a line which starts with the word "Worth" and then has two numbers alongside of that word, "1125" and "1000". What does all that mean? A. The Worth is the name of the boat and the "1125" and "1000" are the snappers on the boat.

Q. Let me ask you this: Wherever you have the name of a vessel and a number or numbers alongside of it, does that mean that the men whose number or numbers those

are are snappers? A. The majority of times, yes. I would say 99 percent of the time.

Q. Sometimes it might be a worker? A. It might be, but the chances are it is not.

Q. Do you ever write down the names of the men on these pages or only their numbers? A. Only their numbers.

Q. So that where you have a name, as, for example on the sheet headed "April 99", such as Card, McKay, Gloria Godkin, that is the name of a vessel? A. That is right, or the names of the boats.

Q. Is what you have just explained as your method of making entries true for all the other dates? A. That is right.

Q. For example, April 10th, April 11th and April 12th? A. Yes.

Mr. Goldstein: I have no further questions.

The Court: Any further questions, gentlemen? I have a few when you get through.

Mr. Goldstein: Not at this moment from me.

Mr. Durham: May Mr. Boylan answer the question which was interrupted now?

The Court: Yes. Well, if you wait until I get through with him. I have one question to ask this witness.

By the Court.

Q. Look at this card. This is a card of a man whose number is 1116, Andersen, Gustav Adolph, and you have him starting to work on 9/15/42. A. I have nothing to do with these cards. These are personnel records.

The Court: All right. I am through with you, then.

PETER J. BOYLAN, recalled, having been previously sworn, further testified as follows:

By the Court.

Q. Is that right? He worked on April 11th, didn't he? A. That is right.

Q. You have got him down there as a second class welder, haven't you? A. That is what he started in as, yes.

Q. That is what the card shows, isn't it? It shows he started as a tacker? A. No. $1.14 rates as a second class welder. $1.20 rates as a first class welder.

Q. That is in ink, isn't it? A. Yes, and that is written in ink, too (indicating). 362

Q. But he started as a second class welder; is that right? A. So did Mr. Fishgold start as a tacker.

Q. Now, you know you would be much better off if you would just answer my questions.

Mr. Smith: Answer the Judge's questions.

Q. He started as a second class welder; is that right? A. That is right.

Q. And, as far as the card is concerned, where I am reading to you "Welder; position, second class," that never was changed, was it? Look at it. A. Well, they put a "1" through there.

Q. The typewritten part was never changed, was it? A. 363
No. The pencil mark is marked through the "2".

Q. The pencil mark is through the "2" which I know nothing about. All I can tell you is what the typewritten record shows, is that right? A. That is right.

Q. Now, here is the record of a man by the name of Horsh, 1862. A. Right.

Q. The record shows he started as a tacker? A. That is right.

Q. And then he is a welder; is that right? A. That is right.

Q. What kind of a welder? A. $1.20 an hour. This is what we go by. That is the first class rate and he got his raises according to those dates.

Q. The first record you have of anything showing he is a first class welder is 12/14/42; is that right? A. That is right.

Q. December 14, 1942. A. That is the date he got the $1.20 rate. That is correct.

Q. Before that he got the $1.14 rate? A. Which is the second class welder's rate.

Q. In other words, before that date he was a second class welder; is that right? A. Correct.

Q. On December 21, 1942, this man was a first class welder, wasn't he; Fishgold? A. No, sir.

Q. Wasn't he? A. No, sir.

Mr. Smith: I have the employment card here, your Honor.

Q. What was he? A. He came in as a tacker, a beginner.

Q. And that is a welder, isn't it? A. A tack welder.

Q. Do you make a distinction in classification in addition to seniority? You give him seniority as a tacker, seniority as a second class welder and seniority as a first class welder? A. Well, that goes according to their grade. They are upgraded as they go on.

Q. Do you give seniority in each grade? A. Yes, sir, we do.

Q. In other words, in determining the seniority of these men whose cards you presented here, you have gone according to the seniority in each grade as they go along; is that right? A. We have to go according to the seniority and the date the man started.

Q. Don't you understand what I mean? If he starts as a tacker he gets a seniority as a tacker, is that right, although he is practically a welder? Is that right? A. Yes.

Q. And then, if he is made a second class welder, there is a seniority there, too; is that right? A. That is right.

Q. And then, if he is made a first class welder, there is a seniority there, too; is that right? A. That is right.

Q. So that in shaping men up, if a man became a second class welder, we will say, before a man came to work with you as a first class welder, the man who came to you as a first class welder later than he was a first class welder, although he was a second class welder during that time, that man would be senior to him in first class, wouldn't he? A. That is true.

Q. And so some of these cards show; is that right? A. They show according to the day they start.

Q. There are quite a few tackers and welders, second class and first class, on these cards with the dates they arrived at them; is that right? A. That is right.

Q. I am asking you what the principle behind this seniority is. Do you have seniority of a tacker and a second class welder and first class welder?

Mr. Goldstein: If your Honor please——

The Court: Let him answer now.

Mr. Goldstein: I would like to raise an objection. I do not think it is competent evidence.

Mr. Smith: May I object to the competency of the witness regarding this? The policy regarding seniority is set by the Labor Relations Council.

The Court: I am asking what these cards show. All right; we will take just the one.

Q. The first time that Horsh became a first class welder shows on this card, 12/14/42; is that right? A. That is correct.

370 *Peter J. Boylan—By the Court—Direct.*

Q. At that time Fishgold was a second class welder? A. He was a tacker, at 82 cents an hour.

Q. A tacker is the lowest form of welder? A. That is a beginner.

Q. According to this record, this considers Horsh senior to him; is that right? A. That is correct.

Q. So I am right in saying that your system is that each man gets a seniority in whatever class he is in? A. It really bases from the date of start.

Mr. Smith: I renew my objection, your Honor. This witness is not competent to testify.

371 The Court: If he is not competent, he can very easily say he does not know.

Mr. Goldstein: I have a different ground of objection, and that is that we are asking a witness to explain to us the effect of a legal document that establishes the mode of calculating seniority and the basis of seniority. That document is the collective bargaining agreement between the parties.

The Court: Let me disabuse your mind. I am going to tell you tomorrow the collective bargaining agreement you have with this company is of no avail to me in this case. I am making that ruling for you.

Mr. Goldstein: You may say so, but we are entitled to place on the record our position with respect to that.

372 The Court: You can place that on the record by your answer.

Q. Now, do you know whether seniority goes according to the different ratings the men have? A. It goes according to his date of start and, if he comes in as a beginner like this man did, every three months we have a set-up that he gets a raise if he qualifies.

Q. Assuming a man became a first class welder before Fishgold did. He is senior to Fishgold, isn't he? A. If he started before Fishgold, yes.

Q. Then what determines seniority? The date he starts to work or the date he becomes a first class welder? A. After all, if Mr. Fishgold started in December of 1942 as a tacker and we had a man came in after him in December, 1942, as a first class welder, in the case of a shape up or lay off, we would keep the first class welder prior to the tacker.

Q. That is right, and that is the way you determine seniority; is that right? A. That is for the Union to answer that. 374

Q. Is that the way the Sullivan Shipyard does it? If you don't know, say so.

Mr. Smith: I renew my objection and I would like a ruling on it.

The Court: I have overruled your objection. He has just answered it before by saying he would keep the first class welder.

Mr. Goldstein: I take it, your Honor, this line of examination, without my troubling you with interruptions, is subject to my objection and my exception.

The Court: Yes. You have raised the question squarely by your answer. You do not have to worry about that.

Mr. Goldstein: I did want my objection noted as 375 continuing.

The Court: All right. That is all I want. I will go through these cards.

Mr. Goldstein: May I ask some questions on the cards?

376 *Peter J. Boylan—By the Court—Direct.*

By the Court.

Q. Do you pay any attention, in shaping up these men, to what you term their ability? A. That is up to the foreman of the department, sir.

Q. Does he pay any attention, do you know? A. Absolutely. That is his job. That is what he is there for.

Q. He pays attention to the fact and, if one man has more ability than the other, he utilizes that in shaping them up, does he? A. Still the seniority phase comes into it.

Q. Seniority is part of it and ability is part of it; is that
377 right? A. That is right.

The Court: Now I have all I want. I will give you back these records.

Mr. Durham: Now may I ask Mr. Boylan to answer my previous question?

The Court: Yes.

By Mr. Durham.

Q. Mr. Boylan, do you remember my question? A. I looked the cards over and I do not see any there which were marked as men who were formerly in the service and discharged from the service.

Q. Men who had completed military service and returned
378 to work? A. Those cards are not so marked.

By the Court.

Q. As far as the cards are concerned, in your perusal of them you can say the cards do not show any of them are war veterans; is that right? A. That is true.

By Mr. Durham.

Q. If they were war veterans, you said the custom or the practice was to enter that on the card, didn't you? A. Yes. If they were former employees who left our service to go into the service, when they came back their discharge papers had to be shown to us and that is marked on the cards.

Mr. Smith: May I ask some questions, your Honor?
The Court: Yes.

By the Court. 380

Q. Under the Selective Service Act, subdivision (c) provides that when a man is restored to his job without loss of seniority he shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices, and so forth. Now, has each man in your plant got an insurance of some kind? A. I don't know.

Q. You haven't any insurance where the company pays a part? A. No.

Q. Have you any other benefits they subscribe to? A. No, sir.

Q. Pension benefits? A. No, sir.

Q. Of course, they have social security benefits? A. That is all. 381

Q. Of course, if they do not work during the year, they lose the benefit of that social security in so far as your plant is concerned; is that right? A. Yes.

Q. You contribute to each employee's social security and he contributed to it? A. That is correct.

Q. So for the time he does not work he loses that social security, doesn't he? A. That is correct.

Q. You haven't any other benefits outside of the seniority and of social security. Am I right in assuming that? A. Yes.

Mr. Smith: May I ask a few questions?

The Court: Yes. You can ask any questions you wish.

By Mr. Smith.

Q. Mr. Boylan, I show you a personal record of Antonio Zappia, No. 1182, and I note in the upper line, over the word "Position", you have the word "Tacker". Is that correct? A. That is correct.

383 Q. What does that indicate to you? A. That indicates a beginner welder. When he first came to our employ he was employed as a tacker.

Q. Does that mean he always remains a tacker? A. No.

Q. I show you the reverse side of that card, and I see the date 7/7/41. After that, the rate, 50 cents. Will you indicate, or explain to the Court, the meaning of those words? A. 7/7/41 was the date of his hire and he was hired at the rate of 50 cents an hour, which we were paying a tacker at that time.

Q. Under that I see the numbers "9/24/41", and under the column "Rate", "75 cents". Would you indicate what that means? A. That means the raise. He got a raise after two and one-half months.

384 Q. Where would it indicate after two and one-half months? A. "9/24/41." That is the date he got the raise.

Q. After that I see "1/7/42", and under the word "Rate" I see ".92". Will you indicate what that means? A. That means that he got another raise to 92 cents on January 7, 1942.

Q. And under that "4/1/42" under the word "Date", and "1.12" under the word "Rate". A. On April 1, 1942, he was raised to $1.12 per hour.

Q. Next to that, "6/23/42" under the word "Date", and under the word "Rate" I see "1.20". Will you indicate what that means? A. It means he was raised to $1.20 on June 23, 1942, which is the first class rate.

Q. And these other rates between 50 cents per hour and $1.20 per hour are different classifications as he goes up the line; is that correct? A. That is true.

Q. On April 9, 1945, April 11, May 17, May 18, May 19, May 21, May 22, May 23 and May 24, 1945, were all the welders who worked on those dates first class men? A. Yes, they were:

Q. Was Mr. Fishgold a first class man in those days? A. Yes, he was. 386

Mr. Smith: That is all.

The Court: Have you got Fishgold's record here?

Mr. Smith: If you want to put it in, your Honor, you may put it in as a Court's exhibit or plaintiff's exhibit.

The Court: You can put it in as my exhibit.

(Employment record of plaintiff received in evidence and marked Court Exhibit 1.)

By Mr. Goldstein.

Q. Mr. Boylan, addressing myself further to this card that Mr. Smith examined you about a moment ago, namely, the card of Mr. Antonio Zappia, on the same side of the card as appears a record of those rates of pay and the dates at which each rate was assigned, respectively, to Mr. Zappia, there is at the very bottom of the card Mr. Zappia's name, Mr. Zappia's number, and then, in typewriting under the caption, "Position", the word "Tacker". Does that indicate Mr. Zappia's current classification, or classification some time after he was hired, or the classification that was

given on the day of his hire? A. That is the classification he was given on the date of his hire.

Q. And that would be true for all of your cards, that the word under the caption "Position", at the very bottom of the face of the card on which are contained the words "Personnel record, Sullivan Dry Dock & Repair Corporation", is the classification at the day of hire? A. That is right.

Q. That is true of all cards? A. That is true.

Q. Now, your $1.20 rate is presently, as Mr. Smith elicited from you, the first class welder's rate? A. That is right.

Q. The $1.12 rate is what rate? A. That was the first class rate on that date.

Q. By "on that date", you mean back in April, 1942? A. That is right.

Q. On June 23, 1942, what happened to the first class welder's rate? A. The first class welder's rate went from $1.12 to $1.20 an hour.

Q. That was under the Shipbuilding Stabilization program that a flat 8 cents an hour increase was given to all your employees? A. To all our employees.

Q. So that at the present time your first class rate is $1.20? A. Yes.

Q. Your second class welder's rate is $1.14? A. Yes.

Q. The third class welder's rate is what? A. $1.

Q. Do you have any tack welder's rate underneath the $1 rate at the present day? A. 88 cents is the tacker's rate now. The starting rate was 82 cents an hour.

Q. Prior to June 23, 1942, each of those rates I have just mentioned was 8 cents per hour lower; is that right? A. That sounds correct; yes.

Mr. Goldstein: I have no further questions on this. I will, with your Honor's permission, request that, of those records of which you may make use in your

findings, photostat copies be placed into the record so that if we must have recourse, any party, to an appellate court, we will have a complete record of those exhibits.

The Court: Oh, yes. You can do that afterwards.

Mr. Goldstein: Thank you very much.

The Court: I have one point I want to check up here.

Mr. Goldstein: While you are doing that, perhaps I can conserve some time by reading into the record some pertinent sections of the seniority sections of the two contracts.

The Court: Yes. They are in your pleadings. 392

(Mr. Goldstein conferred with Mr. Smith.)

Mr. Goldstein: Out of the contract dated May 17, 1944, I would like to read from the article on seniority, which is numbered IV, those sections which Mr. Smith did not place in evidence, namely, Section 1, which reads as follows:

"The following departments shall be recognized in the yard: Hull, welding, pipe-fitting, rigging, burning, inside machinists, outside machinists, blacksmiths, carpenters, joiners, wood caulkers, laborers and fire watchers.

"Section 2. The company shall prepare and post for each such department a list showing the length of service of each employee according to his trade classification within the department. Such lists shall be 393 arranged in order of length of service and copies shall be furnished to the union.

"Any employee may protest in writing his length of service as posted by the plant, provided he does so within two weeks after his name is posted in the list. Such protest shall be handled as any other grievance.

"Section 3. Employees shall lose all seniority rights if (a) they terminate their service voluntarily when

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Motion to Dismiss.

needed, (b) they are discharged for proper and sufficient cause, (c) they do not report for work when notified, unless within three days they present a reasonable excuse, (d) they do not work for the plant for three months (consecutively), unless absence is due to illness or injury (as evidence by a proper medical certificate), or unless leave of absence has been granted."

By the Court.

Q. Here is a card for Max Follander. Will you look at that? A. Yes, sir.

395 Q. He was discharged, the card shows, from the army 4 26/37; is that right? A. That is correct.

Q. You do not consider him a war veteran? That was before the war; is that right? A. That was before the war.

The Court: All right. That is all.

Mr. Smith: If your Honor please, I would like to renew my motion at the close of the case at the prior hearings.

The Court: Yes. What are the grounds of your mo-
396 tion? I would like to have the grounds of your motion specifically.

Mr. Smith: At this time I renew my motion to dismiss the plaintiff's case on the ground they have failed to prove a prima facie case under the act.

The Court: Where is the burden under the act, in your opinion? How much of the burden devolves upon the plaintiff here? How much has he got to go forward in order to show a prima facie case, keeping in mind what the act

says and, too, that anything he might prove in order to show his seniority is of disadvantage to him because it is all in your possession and not his? Is that right? He could not know to whom he is senior or junior, because of the fact that there might be a couple of hundred welders there and you would be the only one who would know that. And, of course, if to prove a prima facie case he has to prove every step of the way, do you think that was the burden the Selective Service Act intended to cast upon him? I have in mind that "burden of proof" is a peculiar term. Sometimes it does shift from the plaintiff to the defendant. Now, in this particular case why wouldn't he have a prima facie case when he shows he is a war veteran, that he has asked for his job within the 90 days and that you refused to put him back? Don't you have to show justification for refusing to put him back?

Mr. Smith: If we had refused to put him back, I think he would have established his case.

The Court: I am going to hold that a layoff from day to day is a discharge. I am going to hold he is a permanent employee. That you wanted a ruling on. I am going to rule that a layoff from day to day is not what is contemplated by the act, and I am going to tell you why. If a guarantee for a year means anything, it means exactly what it says. If you could put him to work one day and lay him off three, and put him to work another day and lay him off two, at the end of a whole year he might only have 30 or 40 days' employment and 300 days out of employment. Would you then say you were adhering to the spirit of the rule?

Mr. Smith: Well, that was his job before he went into the service. The same circumstances existed at that time. The same thing could have happened.

The Court: But what you forget is that Congress guaranteed him a year's work. Now, it either meant what it said or it did not mean anything. It either meant that once

you took him back you had to hold him a year or it did not mean anything. If it means you took him back and the guarantee goes according to the custom and the mode of work he did before, why didn't Congress say so?

Mr. Smith: It is for your Honor to decide what Congress did say.

The Court: I am just trying to be logical about this. If you could lay him off at will, we will say, do you think you would be complying with the statute?

Mr. Smith: Well, we did not lay him off at will. We laid him off of necessity.

The Court: No, because you had other men working those days. Now, if you had no men working those days your defense might be a complete one.

Mr. Smith: Before he went into the army he was laid off because of necessity.

The Court: I have been thinking about this ever since you tried the case and, while I gave you this idea today, I am not sold on that idea. Did Congress really intend to guarantee these fellows a job back provided you had a job?

Mr. Smith: My personal opinion of the act is that Congress wished him to get the same job that he had before, under the same conditions as he had before, no more and no less.

The Court: And leave it to you to decide whether he is senior or not? I do not think they meant quite that.

Mr. Smith: That was decided before he went into the army. That was decided by the War Labor Board.

The Court: They were very gracious to all these boys before they took them and that was a kind of promise they made to them. I am just trying to think out loud.

Mr. Smith: The War Labor Board decided those conditions, your Honor.

The Court: The War Labor Board has made a lot of decisions I am not interested in. There is no appeal from a Labor Board decision and there is here; this is the

place he ought to be, because if you are wrong, or I am wrong, he can have it reviewed.

Mr. Smith: And if the company is wrong, they take the company's plant away from them.

The Court: Yes. I am bothered by the Selective Service Rule 198.

Mr. Smith: And I don't think you are bound by the War Labor Board.

The Court: I know the argument my friend is going to make: seniority. They have men who were working there for 20 years. That is true. But didn't Congress have in mind that if these boys did not go over to war that fellow with the 20 years' job would not have any job? He 404
would be out of a job anyway, because if Mr. Hitler came over here nobody would have had a job. I would not have had one, either.

Mr. Smith: That is a rhetorical question and I suggest you refer that to Mr. Goldstein.

Mr. Goldstein: Since we are thinking aloud, if your Honor please——

The Court: Let him finish his motion. Suppose you make your full motion and I will rule on it. I am inclined to think the burden is on you; first, all the requirements of the statute, and then, if he has not got seniority, you have the burden on that, because you are the only one who has the evidence and he has not.

Mr. Smith: He has access to our records at any time 405
on seniority.

The Court: How has he? What law gives it to him?

Mr. Smith: He can protest his position on the seniority list.

The Court: I mean in this Court.

Mr. Smith: As far as this Court is concerned, I do not know of any law.

The Court: There is no law in this Court that permits him before he starts his action to examine your books. Am I right on that?

Mr. Smith: He has a contract which is sacred in this Court, and under that contract he has the right to examine.

The Court: In this suit under the Selective Service Act there is no rule and no way that he could examine your books before he started his action. Is that right?

Mr. Smith: There is no provision for it that I know of.

The Court: And if you moved to dismiss his complaint before you filed an answer, because it states facts insufficient to sustain the complaint, he would be in hot water, wouldn't he?

Mr. Smith: Undoubtedly.

The Court: And if it was dismissed he would be without redress, and he would be without redress because he
407 could never get the only evidence which might help him.

Mr. Smith: I think on an examination before trial he could get it.

The Court: He cannot get an examination before trial until you answer.

Mr. Smith: That is correct.

The Court: But before you answer you make a motion to dismiss his complaint and out it goes; he is through.

Mr. Smith: I think he could get an inspection on the motion.

The Court: On what motion?

Mr. Smith: On the motion to dismiss.

The Court: There is no rule which says that. You have to answer.

408 Mr. Smith: The right of inspection on the motion. I think the Court can grant him that.

The Court: Well, that is to be seen. I am just thinking out loud. All right; if you have any other part to your motion, you had better make it.

Mr. Smith: I move to dismiss the plaintiff's case on the ground they have failed to prove a prima facie case under the act, and that the evidence fails to establish a violation by the defendant of the act in question.

The Court: That is denied.

Mr. Smith: Exception.

Mr. Goldstein: I would like to make a motion if your Honor please; first, a motion to strike such portions of Mr. Boylan's testimony as I objected to and as were subject to my continuing objection.

The Court: You want to strike out all the testimony you objected to?

Mr. Goldstein: Yes.

The Court: I refuse to do that, because you have an exception which protects you anyway.

Mr. Goldstein: The second motion I would like to make is again for dismissal of the complaint on the ground that 410
neither the complaint nor the testimony and evidence adduced in support thereof show a cause of action on either of the two counts pleaded.

The Court: What do you say about burden of proof?

Mr. Goldstein: I think the burden of proof is completely the plaintiff's, sir.

The Court: How far? What do you mean by prima facie case?

Mr. Goldstein: Let us take two situations.

The Court: Do you mean he has to prove seniority, too? I think up to that point the burden is on him.

Mr. Goldstein: I think you are faced with only one situation, although the plaintiff seems to plead, as I read the brief or memorandum, that there was a failure to restore. 411

Mr. Durham: No, no.

The Court: We will get to you afterwards.

Mr. Goldstein: But there are certainly an adequate series of admissions in the brief and in the evidence and in the record that he was restored to his position. So that I think we can forget that phase of the case. Having been restored, he comes in and says, in effect, "I am discharged."

Evidence is brought to you to show, first—and this will have to be ruled on by you—that he was not discharged. I say this will have to be ruled on by you.

The Court: We are going to skin this down to the bone. I am going to rule that the nine days he was not provided with work amounts to a discharge, and I say that because of the fact that Congress provided a guarantee of a year's work, and again I say if they could lay him off from day to day it would vitiate all the benefit that that one year was intended to give him. I will give you both an exception as to that. So travel from then on. I am going to rule he was a permanent employee, too, so that you can have the issue squarely decided.

Mr. Goldstein: We are actually thinking aloud. I would say this: The burden would still be on the plaintiff under the act to show, at least prima facie, that there was nothing that could be considered a cause for discharge, conceding for the moment that you have already held that a layoff is a discharge.

The Court: He claims he has a seniority which entitled him to work those nine days.

Mr. Goldstein: Then I think it would be up to the defendant to show he was not senior.

The Court: You agree with me, then.

Mr. Goldstein: After there has been a showing of seniority.

The Court: All he can do is claim a seniority.

Mr. Goldstein: He has to show it.

The Court: How can he show it?

Mr. Goldstein: Very readily, because there has already been an answer. There could not be a dismissal of the complaint unless there was an answer, unless the complaint was so frail in its allegations that it did not even begin, in allegation, to make out a prima facie case.

The Court: Supposing the defendant in this Court, as he can, moved for a bill of particulars, before he answered,

as to how he claims seniority in his complaint, and assume, for a moment, that the motion was granted, which could very well be granted, how would he give that?

Mr. Goldstein: The Rules of Civil Procedure give the plaintiff the right to obtain an examination when he pleads that the information sought in the bill, or in the answer, or motion for bill of particulars, is completely within the control of the defendant. Now, it happens, of course, that under the facts of the instant case I am talking about cases generally, as I think you have noted—but under the facts of the instant case it is clear from the record that, his seniority standing was a matter that was completely open to him, that would have to be posted in the plant and was so posted, for all that we know from the record, so that he could always have access to that. I would like to clinch that in your Honor's mind for sleeping over. You seemed to be a bit troubled when Mr. Smith was speaking about the idea that if Congress granted the restored veteran his job subject to seniority rules, that then that actually placed the veteran in the position of being subject to the unlimited right of the employer to determine what seniority he should or should not have.

The Court: I think the burden under the Selective Service Act puts it on the defendant and nobody else.

Mr. Goldstein: I don't mean that. You felt that you could not conceive that Congress would say to the returned veteran "Here is your job back, but your boss can make such rules of seniority as would rob you of the job."

The Court: No, I did not say that.

Mr. Goldstein: I thought that was implied.

The Court: No. Well, get through with your motion first. Are you through with your motion?

Mr. Goldstein: Yes.

The Court: Motion denied. Don't you think that the whole problem simmers down to this: Is the Colonel right that he is entitled to his job back, no matter whom he

pushes out, for one year? It means that if a fellow is there for 20 years and has a wife and 10 children, Colonel Durham says that Congress intended that this plaintiff be allowed to take his place and he is pushed out. If there is only work for two, or for one, and somebody has to go, the non-veteran has to go, no matter how inequitable it is. That is your point?

Mr. Durham: That is my point. That is the whole issue.

The Court: Your point for Local 13 is that employment of a veteran is the same under that act as it would have been, as far as seniority is concerned, before the act was
419 passed. In other words, if there was no act at all and this plaintiff went down for a job, he would be entitled to a job according to his seniority and, if somebody worked there before him——

Mr. Goldstein: That is not true, sir.

The Court: What do you claim is his seniority right?

Mr. Goldstein: If it were not for the special bargaining position in our collective contract which gives returned veterans a right to claim a job, then in the absence of an Act of Congress those veterans would have no right to get a job.

The Court: You have a collective bargaining agreement with this defendant, haven't you?

Mr. Goldstein: Yes.

The Court: Which sets forth the seniority of the men
420 who belong to your union, or the manner of seniority.

Mr. Goldstein: I am getting at another point. You seem to think Congress would have given this man nothing under Section 8 of the Act if it said to the employer, "You have to reinstate him if he applies within 90 days and fulfills certain conditions." I say Congress gave him a lot, because not all the collective bargaining contracts have the clause that our contract has, that a returned veteran must be restored and given full seniority and put back in his job in

the same order as that accumulated seniority would entitle him to. Many contracts do not have it. So when Congress enacted that section it gave literally hundreds of thousands, perhaps millions, of veterans a right they did not have before, even under a collective bargaining contract."

The Court: What rights did Congress give them?

Mr. Goldstein: The right that Congress gave them was to be restored to the same position, or a position of similar seniority, status and pay, if the veteran fulfills certain conditions and if the employer's conditions were such that he could afford that employment. We interpret that to mean that the veteran in two aspects is governed by the seniority rules, if any, prevailing in the plant. If there are no seniority rules, query. I am not answering the questions as to what would happen. But if there were established seniority rules, the veteran got two rights, first, to be restored to his job, if there is work there, in the same order that he would have been restored after a layoff, namely, in accordance with his seniority standing, and, secondly, after he is restored, to be furnished continuously with work for one year in the same fashion and under the same rules as he would have been furnished work prior to his induction; under the seniority rules, in other words.

The Court: But, according to what you say, Congress, in passing this Act said, "You, when you come back, will have the same rights that you had when you left."

Mr. Goldstein: Precisely. "We are not going to let anybody take anything away from you that you would have had by staying on your job."

The Court: "On the other hand, we are not going to push anybody out to suit you."

Mr. Goldstein: That is right.

The Court: You claim the Colonel is wrong.

Mr. Goldstein: Yes.

The Court: That he is entitled to work providing his seniority calls for it and, if seniority does not call for it, he does not get it.

Mr. Goldstein: That is right, sir.

The Court: So that if a boy was taken to war, we will say, two days after he got his job, and he came back, you will agree, for all practical purposes, he would have very little seniority. Is that right?

Mr. Goldstein: The Act of Congress there is a bit on the ambiguous side. The unions have read it generously towards the veteran by saying "We believe the Act means that he not only gets credit for the two days he worked, but for every day he has been away."

The Court: He may be in a firm like this, with 200 welders. He is No. 200 when he leaves. When he comes back, we will say, for all practical purposes, his seniority is not worth very much. He might have been over there two months, shocked and hurt, and comes back. He is still No. 200.

Mr. Goldstein: That is right, sir. Now, may I give you this one thought? You are implying you cannot conceive Congress meant that for two reasons: first, the boy, in your opinion, does not get much and, second, it appears to you that Congress is leaving the boy at the mercy of the employer who creates the seniority rules. May I suggest this to you: these rules which you think Congress could not have, or should not have, intended to leave in the hands of the employer relate to lay-off and reinstatement, and the Act, Mr. Durham at least contends, is not very clear as to that. Let us look at the same Section. The Congress says that as to insurance and other benefits the rules and practices obtaining in the employer's plant shall govern. What is the insurance? That can be a very valuable right. Some firms I have dealings with have insurance with benefits of $50 to $100 a week.

The Court: He pays towards his insurance right.

Mr. Goldstein: Some firms even don't make their employees give up a contribution.

The Court: The Act, insofar as the veteran is concerned, must be construed liberally in his favor.

Mr. Goldstein: Fine.

The Court: So in taking any situation that might exist, we have to take the worst for his benefit. Supposing he has to pay for that insurance. If he has not got a job, query: how is he going to pay? He is out then. Social security is important, and if he does not get back with this firm and work for a year he is out of work——

Mr. Goldstein: Will you permit me to complete my thinking? Insurance benefits can be highly valuable to an employee. There are pension benefits that can be highly valuable. Vacation rights are very large in some plants. In the shipbuilding industry they run two weeks generally. Sick leave. In the oil producing industry you may get up to 18 weeks of absence for illness, with full pay from the employer. So that when Congress said insurance and other benefits, it was covering a field of benefits that might loom up very large in the mind of the veteran. And yet, what did Congress say? That once the veteran was restored to his job his benefits and rights to these varied perquisites to the job I have just mentioned depend upon the rules and practices established in the plant, either by the employer or——

The Court: Will you stop there for just a minute? Supposing he is not restored to the job. He loses all those benefits.

Mr. Goldstein: That is right.

The Court: And is that what Congress intended?

Mr. Goldstein: Yes, and let me show you why. Just think of this. Put a fellow who is on lay-off four months——

The Court: But he has to get back first.

Mr. Goldstein: I know. Let us say he is back. What will his right to sick benefits be governed by? The rules and practices. Congress said the rules and practices that prevail in the employer's plant. Determined by whom?

Either by the employer unilaterally or by collective bargaining. Now, to that fellow those four months' pay is just as valuable as to Mr. Fishgold were the nine days' pay, and Congress says the right to the four months' pay shall be regulated by the rules and practices established in that plant. Why would it say that, in respect to so valuable a right as the sick leave, the employer can determine it, but, in respect to a right in Mr. Fishgold's case, of much less value, only nine days' employment, he must have an absolute right the employer may not establish? What did Congress mean when it said he shall be restored without loss of seniority? There is no absolute seniority. Seniority is a thing created by agreement. Congress meant he was not to be deprived of seniority. What seniority? The seniority established in the plant by the same method as the rules and practices with reference to insurance.

The Court: Now, wait a minute. Any person who is restored to a position in accordance with the provisions of paragraph A or B. So being restored, a man's position is very important, isn't it?

Mr. Goldstein: Yes.

The Court: And, if he is restored, he gets all the benefits you claim he might have because of his employment, but, if he is not restored, he cannot get those benefits.

Mr. Goldstein: That is right, sir.

The Court: Now, then, let us think a little bit further. Supposing a veteran comes back and he is never restored to his position. Wouldn't it be to the advantage of the company not to take him back, so as to cut him from all these benefits that they have to pay towards, and isn't that what Congress said? "If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay."

Mr. Goldstein: Right. Now, why do they introduce seniority there?

The Court: I think we have read this statute wrong. We read things quickly. "If such position was in the employ of a private employer"—and you admit it was in that employ—"such employer shall restore such person to such position"—to a position like he had when he left—"or to a position of like seniority and status," which means if he left as a first class welder they cannot put him back as a second class welder or as a tacker; they have to put him back as a first class welder.

Mr. Goldstein: That would be under "status".

The Court: That is the seniority they mean.

Mr. Goldstein: No; seniority has nothing to do with pay.

The Court: "Such employer shall restore such person to such position as he had when he left, or a position of like nature" they could have said. 434

Mr. Goldstein: Notice how they spell it out, "seniority, status and pay." You have got to give meaning to "status"; you have got to give meaning to "pay".

The Court: If you stop at "seniority" it is complete. "Status" is an added word which does not qualify the "seniority", and "pay" does not qualify "seniority".

Mr. Smith: "Pay" and "seniority" are not synonymous in this case.

Mr. Goldstein: Neither is "status" and "seniority" synonymous.

The Court: If Congress intended to do what you men say they intended to do, they did not give this veteran a thing. He has got to go back to his union contract and, if there isn't any union contract, he is at the mercy of the employer. 435

Mr. Goldstein: If you want me to join you in criticizing Congress, I will agree with you. The reason they did not give the man a thing is over here (indicating): not because of Section 8 (c), but because of Section 8 (b). Read the last two lines of 8 (b).

The Court: "Unless the employer's circumstances so change as to make it impossible or unreasonable to do so."

Mr. Goldstein: That is where Congress deprived the veteran of everything it purported to give him.

The Court: No; that means if the plant is shut down or they are not doing any work any more, then he cannot get a job.

Mr. Durham: Or not enough work.

Mr. Goldstein: Mr. Durham says not enough work. What happens when there is not enough work? Then it would become unreasonable to put this man back over the employee——

437 The Court: No, no. If there are only ten welders going to be hired tomorrow and there are fifteen war veterans, they take ten of those war veterans and five have to stay out and the five cannot do anything about it because they have hired war veterans anyhow. Isn't that what you mean, Colonel?

Mr. Durham: Absolutely.

Mr. Goldstein: I think if you think of one thing tonight: why Congress should, with respect to shaping up, have said "seniority does not count, you have got to keep this guy at work," but, with respect to other equally valuable perquisites, insurance, sick leave, pensions, vacations, bonuses, said "your rights shall be the rights that you would have had under the rules established by the boss?" Just think of that.

438 The Court: All right. Now we will talk off the record. We will leave that open until tomorrow.

(There was discussion off the record.)

(A recess was taken until 10:30 A. M., August 30, 1945.)

United States Court,
Brooklyn, New York,
August 30, 1945.

Met pursuant to recess.
Appearances as heretofore noted.

(Argument of counsel.)

The Court: Everybody in this case has seriously tried to cooperate in having a very quick and speedy trial. The case has been tried out of order and nobody has tried to do one single thing except help the Court to render a just 140
and fair decision, and I make that public statement because of the fact that I think you all deserve it. I think this veteran will agree he has gotten a very fair trial and nothing has been done in this case by anybody except to give him just that.

(Further argument by counsel.)

Decision of the Court.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.] 141

United States Court House,
Brooklyn, N. Y.,
August 30, 1945.

HONORABLE MATTHEW T. ABRUZZO, U. S. D. J.

The Court: In this particular case it is not in dispute that the plaintiff has complied with all of the technical re-

quirements of the statute. He was a welder working for the defendant. I find that his employment was permanent and steady. He left his employment for induction into the armed service of the United States, and had to leave his position for that purpose. He received a certificate in compliance with the statute, that he had been discharged honorably. It is neither in dispute that he is qualified to perform the duties of the position of welder—he was a first class welder—and it is not in dispute that he made his application for reemployment and that he actually was re-employed after making the request under the Selective Service Act.

443 The plaintiff claims that he is entitled to be employed under Section B of the Selective Training and Service Act of 1940, as amended, which reads as follows, referring to the plaintiff's position:

> "If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority * * *"

and I take that to mean that this plaintiff is entitled to come back to his work as a first class welder and that he is entitled to come back to work in preference to anybody else who might be working on any of the days that he applied for work, except a veteran in his own category.

The proof in this case is that there were forty-six men and five snappers working on the first day, April 9th, who
444 were all non-veterans, and I hold that the defendant has violated the terms of the statute by not employing the plaintiff on April 9th, and that "status" and "pay", unless the employer's circumstances had been changed so as to make it impossible or unreasonable to do so, are merely descriptive words which mean that he had to be taken back as a first class welder and not as a second class welder and that his pay rate would stay the same.

I find, and I do not think there is any dispute, that the defendant's plant had not so changed so that it was impossible or unreasonable to employ this plaintiff, and there is no claim to that effect whatsoever.

In reading subdivision (c), with regard to the benefits which were to be restored to him, it strengthens my belief that that is the way the veteran was entitled to employment under Section B, for the reason that he could not obtain any of the benefits set forth in subdivision (c) until he first got his job back, and Congress intended that he was to be entitled to his job over everybody else but a veteran in his own category. Subdivision (c) strengthens my belief that this interpretation is correct, because it adds the clause that he is to be retained in that position and not discharged within one year after such restoration, because I am convinced that Congress had in mind that a returning veteran should have the opportunity of having one year in which to rehabilitate himself, and one year to avoid open competition with his fellow employees, due to the fact that for two, three or four years he was away.

I am not going into the equity of that situation; I am not concerned with whom he has to displace. That is the way I interpret the statute, and that is the way I interpret the veteran's rights under the Selective Service Act. There is no issue here as to the collective bargaining act, but in passing I might state that the collective bargaining act before me conforms exactly, as far as I can see, to the language of the Selective Service Act. So that if there were any issue as to that, the issue would be the same because the language of the collective bargaining act is the same.

I find that on April 9th and the other eight days that the plaintiff was not allowed to work, non-veterans were employed on each and every one of those days, and I find nothing to the defense that the shaping up of the plaintiff on these nine days is not a discharge, as Local 13 has in

448 *Decision of the Court.*

dicated. They say that he was not discharged, that he was just let out those days, which is not tantamount to a discharge, but I find no merit in that argument, because I believe that Congress intended that during the period of one year any day that there was work, between veterans and non-veterans the veteran was entitled to the preference and he was not to work only if the defendant had no work or had to choose between World War veterans of World War II.

I find that allowing non-veterans to work these nine days is a violation of the statute and the plaintiff is entitled to judgment for these nine days' work.

449 I do not give you a declaratory judgment because the time has expired and you are getting the money judgment that you asked for, nine days, and that judgment will suffice in this particular case. I do not know whether you are entitled to a declaratory judgment. Offhand I would say no, because you asked for a money judgment and I do not think you can confuse the two. But, be that as it may, it is not necessary in this case.

There has been a defense set up here, or a point made, that because of the word "seniority" used in the Selective Service Act it means that welders who worked in this plant and started their work before the plaintiff would be senior to him and that Fishgold could not replace them. That is the defense Local 13 has advanced to this Court, and, to some extent, is the same defense that the Sullivan Shipyard has advanced. In view of my decision, I do not believe it is necessary to make a finding on this point, but, if I had to, on the facts before me I would still find a judgment for the plaintiff.

I think it is only fair to state my reasons for this conclusion. The proof indicates that forty-six men were allowed to work on April 9th who were non-veterans. Their cards are in evidence. It is very confusing to make a determination based on these cards as to just who is senior.

451

because the cards contain the information that some were tackers, some second class welders, and then eventually became first class welders. The dates and the information contained in the cards are very meager. A witness for the defendant testified that seniority in time of employment plus ability was the yardstick used to measure who should or who should not work.

In the confused state of this particular proof I would be inclined to hold that the burden of proof as to that is on the defendant and it has not sustained it. I say that because of the fact that it would be impossible for the plaintiff, nor could it be expected, that he assume this burden when the only evidence as to that is in the possession of the defendant and it would be almost impossible for plaintiff to have access to it without starting his lawsuit. I believe that Congress intended that when the plaintiff showed a prima facie case, if this defense were a good one, it intended the burden to be upon this defendant, and I believe that is the proper place to put this burden.

452

In view of my decision, I will respectfully ask counsel to submit findings of fact, conclusions of law, and a decree just as soon as you can.

MATTHEW T. ABRUZZO,
U. S. D. J.

453

Plaintiff's Exhibit 1.

Copy of certificate of discharge of plaintiff.

(Omitted pursuant to stipulation.)

454

Plaintiff's Exhibit 2.

(Copy)

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA
Brooklyn Local No. 43
5119 Fourth Avenue
Brooklyn 20, New York

March 16, 1945

Mr. Read Smith
Sullivan Dry Dock & Repair Corp.
455 Foot of 23rd Street
Brooklyn, New York

Dear Mr. Smith:

We are taking this opportunity to notify you that we strenuously object to you employing A. Fishgold, welder out of his seniority position during a lay-off, while men with much greater length of service are not put to work.

Under Section 8 of the Selective Service Act, a veteran is to be given his original seniority position. In the event that it becomes necessary to lay men off due to lack of work, each man shall be laid off according to the seniority position in the working agreement.

456

Very truly yours,

John King (Sgd)
John J. King
Business Agent

JJK:EF
uopwa #1

457

Defendant's Exhibit A.

Order of National War Labor Board Shipbuilding Commission dated February 25, 1944.

(Omitted pursuant to stipulation.)

Defendant's Exhibit B.

Document relating to arbitration proceeding.

(Omitted pursuant to stipulation.)

458

Defendant's Exhibit C.

Shape-up ticket.

(Omitted pursuant to stipulation.)

Defendant's Exhibit D.

Pay-off slip.

(Omitted pursuant to stipulation.)

459

Court Exhibit E.

Cards covering nine days.

(Omitted pursuant to stipulation.)

460

Court Exhibit F.

Book.

(Omitted pursuant to stipulation.)

Court Exhibit G.

Book.

(Omitted pursuant to stipulation.)

461

Court Exhibit H.

Typewritten sheets.

(Omitted pursuant to stipulation.)

Court Exhibit I.

Employment record of plaintiff.

(Omitted pursuant to stipulation.)

462

463

Intervenor's Proposed Findings.

UNITED STATES DISTRICT COURT

For the Eastern District of New York.

Abraham Fishgold, Plaintiff, against Sullivan Dry Dock & Repair Corporation, Defendant, Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members, Intervenor.	C-5700

464

Findings of Fact
and
Conclusions of Law

This matter came on regularly for hearing pursuant to stipulation of the parties and order of this Court on the 20th, 29th and 30th days of August, 1945, before Hon. Matthew T. Abruzzo, District Judge, upon the complaint of plaintiff and issue joined by answer of defendant and the answer of intervenor pursuant to order duly entered herein authorizing intervention as an additional defendant; plaintiff appearing in person and being represented by Knowlton Durham, Esq., his attorney; defendant being represented by J. Read Smith, Esq., its attorney; intervenor being represented by William L. Standard, its attorney, M. H. Gold-

465

466 *Intervenor's Proposed Findings.*

stein and Herman Rosenfeld, Esqs., of Counsel; and Congress of Industrial Organizations, by and through its attorney, Harold Cammer, Esq., having been authorized to appear as *amicus curiae*. Evidence having been introduced on behalf of all the parties, including intervenor, and the Court having heard the oral argument of respective counsel, including *amicus curiae*, and being fully advised in the premises, now makes and enters its:

FINDINGS OF FACT

I

467 Plaintiff is a resident of the Borough of Brooklyn in the City and State of New York.

II

Defendant Sullivan Dry Dock & Repair Corporation at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of New York and maintained a shipyard for the construction and repair of naval and other vessels at the foot of 23rd Street in the Borough of Brooklyn, City and State of New York.

III

The intervenor, Roy Granata, is the Acting President and Acting Treasurer of Local 13, Industrial Union of Marine 468 and Shipbuilding Workers of America, a voluntary association including among its members employees of the defendant at the defendant's shipyard, including plaintiff.

IV

On February 20, 1942, said Local 13 was, pursuant to the National Labor Relations Act, certified by the National Labor Relations Board as the exclusive representative of all the employees, including welders, of defendant.

V

On April 6, 1942, defendant and intervenor, in compliance with the requirements of the National Labor Relations Act, entered into a written collective bargaining agreement (which remained in effect until supplanted by a new collective bargaining agreement executed May 17, 1944), stipulating the terms and conditions of employment which were to prevail in the defendant's shipyard for all defendant's employees, including welders.

VI

Among the provisions of the collective bargaining agreement mentioned in the next preceding finding was Article 470
III, entitled "PROMOTIONS—SENIORITY—TRANSFERS—SHOP STEWARDS", Section 1 of which read as follows:

> "In all cases of promotion, increase or decrease in the working force, the total accumulated length of service and ability to do the job shall be the basis for any said promotions or increases or decreases in the working force."

VII

On or about the 21st day of December, 1942, plaintiff was hired by defendant as a tacker and continued to be employed by defendant until on or about May 22, 1943, on which date he was classified as a third class welder, having 471
attained such latter classification, and the wage rate of $1.00 per hour pertaining thereto, on March 22, 1943.

VIII

On the 22nd day of May, 1943, plaintiff was inducted into the land forces of the United States under the provisions of the Selective Training and Service Act of 1940,

as Amended, for training and service and on said date, in order to perform such training and service, left his position of employment with said defendant.

IX

On or about February 25, 1944, the Shipbuilding Commission of the National War Labor Board, to which said Board had, pursuant to the provisions of the War Labor Disputes Act, delegated authority so to do, issued its Directive Order to the defendant and intervenor requiring them to incorporate into a written collective bargaining agreement the following provision among others:

473 "Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Whenever between two or more men ability is fairly equal, length of service shall be the controlling factor."

X

On May 17, 1944, pursuant to the Directive Order mentioned in the next preceding finding, the defendant and intervenor executed a written collective bargaining agreement incorporating the provision quoted in the next preceding finding.

XI

474 The plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which day he was honorably discharged therefrom and received a certificate certifying that he had satisfactorily completed his period of training and service in the Army of the United States.

XII

Within forty (40) days after plaintiff was relieved from such training and service (that being the period then prescribed in the Selective Training and Service Act of 1940, as Amended, for such application), plaintiff made application to the defendant Sullivan Dry Dock & Repair Corporation for reemployment and such application was granted, and plaintiff was reemployed and restored by defendant, on the 25th day of August, 1944, to the position, status, and pay which he had had on May 22, 1943, namely, third class welder at the rate of $1.00 per hour, and without loss of seniority.

XIII

Thereafter, on September 25, 1944, plaintiff was reclassified by defendant to second class welder at a wage rate of $1.14 per hour, and on December 25, 1944, was reclassified to first class welder at a wage rate of $1.20 per hour.

XIV.

The volume of work in a ship repair yard such as that operated by the defendant fluctuates sharply from day to day and from week to week so that the number of employees required in any type of work by the defendant fluctuates accordingly, and the defendant has, as a consequence, for the last twenty-six years, used a system known as the "shape-up" which has for many years been prevalent in the ship repair industry in the Port of New York, as a method of allocating the amount of work available on any day among its employees.

XV

The procedure whereby said "shape-up" is effectuated is that at the end of the work-day, if there is to be a reduction in the working forces for the following day by reason of

the lowered quantity of work available for any craft, employees in such craft are notified that they need not report to work on the following day, the employees so to be notified being selected at the defendant's repair yard in accordance with the provision of the collective bargaining contract quoted in Findings Nos. VI and IX above.

XVI

At the defendant's ship repair yard, and at all other ship repair yards in the Port of New York, the employment of an employee who is shaped-up is not considered terminated; the employee is not required to remove his tools
479 or other belongings from the employer's premises; the employee is not required to fill out a new application for employment upon return to the yard and assignment to work after receipt of a "shape-up" notice; and the employee's seniority, under the collective bargaining contract between the defendant and the intervenor, is not affected by such "shape-up".

XVII

During the month of March, 1945, the amount of welding work available in the defendant's ship repair yard was insufficient to afford work for all the welders in its employ so that the plaintiff, by reason of his having a shorter total accumulated length of service in the employ of defendant,
480 was shaped-up on one or more days during said month, whereupon plaintiff complained to Selective Service Headquarters, at New York City, which thereupon, in writing, directed defendant not to shape-up plaintiff for a period of one year from August 25, 1944, so long as there was some welding work available, irrespective of the fact that plaintiff had lesser seniority than other welders in the employ of defendant and was, therefore, under the collective bargaining contract between defendant and intervenor,

to be shaped-up if there was insufficient welding work both for him and for other employees possessing greater seniority.

XVIII

Thereafter, during the month of March, 1945, the defendant, pursuant to such instructions from Selective Service Headquarters, shaped-up one G. Jackerson, a welder in its employ, and assigned plaintiff to work, despite the fact that said employee, G. Jackerson, possessed greater seniority than plaintiff and was hence, under the provisions, quoted in the preceding findings, of the collective bargaining contract between defendant and intervenor, entitled to be assigned to work in preference to the plaintiff, if there was insufficient work both for the plaintiff and for other welding employees, including said Jackerson, who had greater seniority than plaintiff.

XIX

Thereafter, on April 2, 1945, intervenor filed with defendant a complaint that defendant had violated said provisions of said collective bargaining contract, which complaint, in accordance with the provisions of said collective bargaining contract, was finally submitted to arbitration by Frank Harris, Esq., who was selected as umpire for that purpose by the National War Labor Board.

XX

Among the provisions of the collective bargaining contract between the defendant and the intervenor was the following:

> "Should any difference arise between the Company and the Union with respect to any grievance or with respect to the meaning or the application of any of

the provisions of this Agreement, they shall be disposed of between the parties hereto and an earnest attempt shall be made to settle such differences within a reasonable time as hereinafter provided.

"In the event that a dispute shall not have been settled satisfactorily between the Union and the Company, said dispute shall be submitted to arbitration. If, within five (5) days after the date of the decision of the Company with which the Union disagrees, the Company and the Union cannot agree upon an Arbitrator, the National War Labor Board shall be asked to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters to be arbitrated under the within contract shall be limited to the interpretation and application of the said Contract."

XXI

Said umpire, thereafter, on May 4, 1945, issued his award in which he found that G. Jackerson should not have been shaped-up in order to provide work for the plaintiff, but that such shape-up should have been made on the basis of relative length of service in the employ of defendant, or the seniority of said plaintiff and other employees, in accordance with the above quoted provisions of the collective bargaining contract respecting selection of employees for assignment to work when a decrease in the working forces was essential.

XXII

Thereafter, on May 17, 18, 19, 21, 22, 23 and 24, 1945, and in conformity with such arbitration award of the umpire, the defendant, by reason of there being insufficient welding work available on such days for the plaintiff as well as for all other welders possessing greater seniority

than the plaintiff, did not assign plaintiff to work on such days.

XXIII.

On each of the days referred to in the next preceding finding the welders who were assigned to work by defendant all possessed a greater total accumulated length of service in the employ of the defendant than did the plaintiff, and had ability to perform such work at least equal to that of the plaintiff.

From the foregoing Findings of Fact, the Court concludes as a matter of law: 488

Conclusions of Law

I

Upon his application after his honorable discharge from the armed forces, defendant restored plaintiff, without loss of seniority, to the position which plaintiff held at the time he left the defendant's employ in order to perform training and service required of him under the Selective Training and Service Act.

II

The plaintiff's seniority, and his rights pursuant to such seniority, to be assigned by the defendant to any welding work which it had available for its employees, were, pursuant to the National Labor Relations Act, the War Labor Disputes Act, and the Selective Training and Service Act, such only as provided in the collective bargaining contract between the defendant and intervenor in effect at the time plaintiff left his position with the defendant. 489

490 *Intervenor's Proposed Findings.*

III

The defendant's failure to assign plaintiff to such welding work as was available in its shipyards on April 9 and 11, May 17, 18, 19, 21, 22, 23, and 24, and the assignment thereto instead of such other welders in the defendant's employ as had greater total accumulated length of service for the defendant was

(a) in conformity with and required by said collective bargaining contract; and

(b) in full conformity with, required by, and not in diminution of, or detraction from the seniority of the plain-
491 tiff in his position with the defendant at the time of his induction into the armed forces; was not a discharge within the meaning of Section 8, Subsection (c) of the Selective Training and Service Act of 1940, as Amended; and was in conformity with, and not in violation of, the Selective Training and Service Act of 1940, as Amended.

IV

If the defendant's failure to assign plaintiff to such welding work as was available in its shipyards on the dates mentioned in the next preceding conclusion was a discharge within the meaning of Section 8, Subsection (c) of the Selective Training and Service Act of 1940, as Amended, said discharge was, in conformity with the provisions of
492 said Selective Training and Service Act, for cause, said cause being

(a) the obligation of the defendant, under the National Labor Relations Act, to comply with the provisions of the collective bargaining contract between defendant and intervenor, as to the seniority rules regulating the selection of employees not to be assigned to work in the event a decrease in working forces became necessary;

(b) the obligation of the defendant under the provisions of the National Labor Relations Act and the War Labor Disputes Act to comply with the umpire's arbitration award; and

(c) lack of sufficient welding work on the dates aforesaid to afford work to both the plaintiff and all other welders of at least equal ability to perform such work and greater total accumulated length of service in the employment of the defendant; and the consequent necessity upon the defendant to reduce the working force on such days, including plaintiff in such temporary reduction in the working force.

V

Provisions of the Selective Training and Service Act of 1940, as Amended, do not require that the defendant should assign the plaintiff to work in preference to non-veteran welders employed by the defendant who possess relatively equal skill and greater seniority, determined pursuant to the collective bargaining contract between the defendant and intervenor, than the plaintiff, when the amount of welding work available at the defendant's shipyard was such that there was not sufficient work for plaintiff as well as such other welders.

VI

Plaintiff was not entitled to be assigned to work by defendant on the days mentioned in the third conclusion of law above since there was only sufficient work available to keep welders in the employ of the defendant with greater accumulated total length of service for the defendant employed on each of such days.

VIII

The defendant did not, as to the plaintiff, violate the Selective Training and Service Act of 1940, as Amended,

496 *Findings of Fact and Conclusions of Law.*

in this case, and is, therefore, entitled to judgment in his favor.

Done in open Court this day of September, 1945.

United States District Judge.

Presented by:

William L. Standard,
Attorney for Intervenor,
M. H. Goldstein and
Herman Rosenfeld,
Of Counsel.

497

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT

For the Eastern District of New York.

Abraham Fishgold,
Plaintiff,
against
Sullivan Dry Dock & Repair Corporation,
Defendant,

498 Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor.

C-5700

This matter came on regularly for hearing pursuant to stipulation of the parties and order of this Court on the

20th, 29th and 30th days of August, 1945, before Hon. Matthew T. Abruzzo, District Judge, upon the complaint of plaintiff and issue joined by answer of defendant and the answer of intervenor, pursuant to order duly entered herein authorizing intervention, plaintiff appearing in person and being represented by Knowlton Durham, Esq., his attorney, defendant being represented by J. Read Smith, Esq., its attorney, intervenor being represented by William L. Standard, its attorney, M. H. Goldstein and Herman Rosenfeld, Esqs., of Counsel, and Congress of Industrial Organizations by and through its attorney, Harold Cammer, Esq., having been authorized to appear as *amicus curiae* and evidence having been introduced on behalf of all the 500
parties, including intervenor, and the Court having heard the oral arguments of respective counsel, including *amicus curiae*, and being fully advised in the premises, now makes and enters its:

FINDINGS OF FACT

I

That plaintiff is a resident of the Borough of Brooklyn in the City and State of New York.

II

That defendant Sullivan Dry Dock & Repair Corporation at all times hereinafter mentioned was a corporation organ- 501
ized and existing under the laws of the State of New York and maintained a shipyard for the construction and repair of naval and other vessels at the foot of 23rd Street in the Borough of Brooklyn, City and State of New York.

III

That the intervenor Roy Granata is the Acting President and Acting Treasurer of Local 13, Industrial Union of

Marine and Shipbuilding Workers of America, which is a voluntary association, including among its members workers, including plaintiff, in the defendant's shipyard and that the Congress of Industrial Organizations, appearing herein as *amicus curiae*, is the parent body of which Local 13 is an affiliate and the Local Representative of the parent body.

IV

That the plaintiff entered the employ of the defendant, Sullivan Dry Dock & Repair Corporation, as a welder on or about the 21st day of December, 1942, and was employed by said defendant in that position steadily until on or about the 22nd day of May, 1943, and that such position occupied by the plaintiff with the defendant was other than a temporary position.

V

That on the 22nd day of May, 1943, plaintiff was inducted into the land forces of the United States under the provisions of the Selective Training and Service Act of 1940, as Amended, for training and service and on said date, in order to perform such training and service, left his position of employment with said defendant.

VI

That, thereafter, the plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which day he was honorably discharged therefrom and received the certificate prescribed in Section 8 of the Selective Training and Service Act of 1940, as Amended, certifying that he had satisfactorily completed his period of training and service in the Army of the United States.

VII

That, at the time of his discharge and at the time of his application to his employer for reemployment, plaintiff was qualified to perform the duties of the position of first-class welder which he had held in the defendant's employ and which he had left upon his induction into the Army of the United States.

VIII

That within forty (40) days after plaintiff was relieved from such training and service (that being the period then prescribed in the Selective Training and Service Act of 1940, as Amended, for such application), plaintiff made 506
application to the defendant Sullivan Dry Dock & Repair Corporation for reemployment and such application was granted, and plaintiff was reemployed and restored as a first-class welder on the 25th day of August, 1944.

IX

That, thereafter, the plaintiff was employed steadily and continuously by the defendant in such position until the 9th day of April, 1945, on which day the defendant refused to employ the plaintiff and to permit him to work and said defendant furthermore refused to employ and permit the plaintiff to work in his said position on the following days, namely, April 11, May 17, May 18, May 19, May 21, May 22, May 23 and May 24, 1945, and that on each of said 507
days plaintiff's wages, had he been employed by the defendant, would have amounted to Nine and 60 100 Dollars ($9.60) for eight hours of work, and that on each of said days plaintiff was available for work in the defendant's shipyard.

508 *Findings of Fact and Conclusions of Law.*

X

On each of the days mentioned in the preceding Finding, on which the plaintiff was denied work by the defendant, the defendant's plant was in operation and other employees, possessing the same or comparable skill as the plaintiff, were employed and continued at work by the defendant.

XI

That on each of said days referred to in the preceding two Findings, none of the welders, who were employed and continued at work by the defendant doing work similar to the work plaintiff was qualified to do, had served in and
509 been discharged from the Armed Forces of the United States in World War II.

XII

That on April 9, 1945, the first of the days on which the plaintiff was refused work by the defendant, as stated in Finding "IX" there were forty-six (46) welders and five (5) "snappers", or boss welders, working for the defendant in its said shipyard, none of whom had served in and been discharged from the Armed Forces of the United States in World War II.

XIII

That on each of the other days on which plaintiff was
510 denied work by the defendant, as set forth in Finding "IX", there were as many or more welders and "snappers" as on April 9, 1945, working for defendant in its said shipyard, none of whom had served in and been discharged from the Armed Forces of the United States in World War II.

XIV

That under the provisions of the Selective Training and Service Act of 1940, as Amended, plaintiff was entitled to be retained in his employment with defendant for a period

of one (1) year after restoration to his position with defendant in preference to non-veteran employees even though their length of service with the defendant was greater than plaintiff's, including his service in the Armed Forces as service with defendant.

XV

That the burden of proving seniority under the Selective Training and Service Act of 1940, as Amended, is a duty imposed upon the defendant and the Court finds there was a failure of proof to sustain that burden.

XVI 512

That defendant laid off or "shaped up" the plaintiff upon the nine (9) days specified in Finding "IX" contrary to the provisions of the Selective Training and Service Act of 1940, as Amended.

And from the foregoing Findings of Act, the Court concludes as a matter of law:

CONCLUSIONS OF LAW

I

That the position of first-class welder which the plaintiff left, in order to perform training and service under the Selective Training and Service Act of 1940, as Amended, was other than a temporary position in the employ of 513
the defendant Sullivan Dry Dock & Repair Corporation.

II

That the position as first-class welder in which the plaintiff was employed by the defendant which he left to perform the training and service referred to in the preceding Conclusion was a position in the employ of a private employer and at the time when the plaintiff made application for re-employment the defendant's circumstances had not so

514 *Findings of Fact and Conclusions of Law.*

changed as to make it impossible or unreasonable for the defendant to restore the plaintiff to such former position.

III

That application within forty (40) days after plaintiff received his Honorable Discharge (Ptff.'s Ex. 1) on July 12, 1944; and the prescribed certificate of satisfactory service, satisfied the requirements of Section 8 of the Selective Training and Service Act of 1940, as Amended (Sec. 308, Title 50 (App. U. S. C. A.), and it was not necessary under the said Act and the facts and circumstances of this case for plaintiff to make application for his former position
515 prior to that time.

IV

That the refusal of the defendant to employ the plaintiff and permit him to work in his position as welder on April 9 and 11, and May 17, 18, 19, 21, 22, 23 and 24, 1945, referred to throughout the testimony in this case as "shaping-up", constituted a discharge from his position of employment with defendant and a violation of the prohibition of Section 8 (c) of said Act against discharge "from such position without cause within one year after such restoration"; and that the defendant violated the provisions of said Statute by not employing the plaintiff on each of such days.

516 V

That the provisions of Section 8 of the Selective Training and Service Act of 1940, as Amended, required in the instant case that the defendant employ the plaintiff in preference to other non-veteran welders possessing comparable skill and experience having greater seniority than the plaintiff, if the conditions at the defendant's shipyard were such on any of the days plaintiff was "laid off" from

work that there were not sufficient jobs available for all the welders applying for work.

VI

That the plaintiff was entitled to his position on each of the days as stated in the previous Conclusion of Law.

VII

That the defendant, in allowing non-veterans to work on the nine (9) days stated in the preceding Conclusion in preference to the plaintiff, violated the Selective Training and Service Act of 1940, as Amended, and the plaintiff is entitled to judgment for the amount of wages he would 518
have received had he worked on each of said days.

Done in open Court this 16 day of October 1945.

s/s Matthew T. Abruzzo,
United States District Judge.

Presented by:

Knowlton Durham,
Attorney for Plaintiff.

519

520

Decree Appealed From.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD,
Plaintiff,
against
SULLIVAN DRY DOCK & REPAIR CORPORATION,
Defendant,
521
ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor.

C-5700

This matter came on regularly for hearing pursuant to stipulation of the parties and order of this Court on the 20th, 29th and 30th days of August, 1945, before Honorable Matthew T. Abruzzo, District Judge, upon the complaint of plaintiff and issue joined by answer of defendant and
522 the answer of intervenor, pursuant to order duly entered herein authorizing intervention, plaintiff appearing in person and being represented by Knowlton Durham, Esq., his attorney, defendant being represented by J. Read Smith, Esq., its attorney, intervenor being represented by William L. Standard, Esq., its attorney, M. H. Goldstein and Herman Rosenfeld, Esqs., of counsel, and the Congress of Industrial Organizations by and through its attorney, Harold Cammer, Esq., having been authorized to appear as *amicus curiae*.

and evidence having been introduced on behalf of all the parties, including intervenor, and the Court having heard oral arguments of respective counsel, including *amicus curiae*, and being fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law, now therefore, it is:

ORDERED, ADJUDGED AND DECREED that the plaintiff, Abraham Fishgold, do recover of the defendant, Sullivan Dry Dock & Repair Corporation, the sum of eighty-six and 40/100 ($86.40) dollars.

Dated: New York, N. Y., October 16, 1945.

s/s MATTHEW T. ABRUZZO,
U. S. D. J.

526

Notice of Appeal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD,
Plaintiff-Respondent,

against

SULLIVAN DRY DOCK & REPAIR CORPORATION,
527 Defendant,

ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor-Appellant.

Sirs:

PLEASE TAKE NOTICE that Roy Granata, as Acting Pres-
528 dent and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members, the intervening defendant herein, hereby appeals from the final decree of this Court entered in the Clerk's Office on the 16th day of October, 1945, and from each and every part of said decree to the United States Circuit Court of Appeals for the Second Circuit to be held in and for the

said Circuit, at the City of New York, in the Southern District of New York.

Dated: New York, November 14, 1945.

Yours, etc.,

WILLIAM L. STANDARD,
Attorney for Intervening Defendant-Appellant,
291 Broadway,
New York 7, N. Y.

To:

J. READ SMITH, Esq.,
Attorney for Defendant,
44 Court Street,
Brooklyn, N. Y.

KNOWLTON DURHAM, Esq.,
Attorney for Plaintiff,
70 Pine Street,
New York, New York.

532

Stipulation as to Exhibits.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that all the exhibits admitted in evidence on the trial of this action may be omitted from the record on appeal herein, except Plaintiff's Exhibit 2, which is printed in full herein.

533 IT IS FURTHER STIPULATED that said exhibits may be handed up to the Court upon the argument of the appeal and may be referred to in the briefs of the respective parties hereto with the same force and effect as if printed herein in full.

Dated, New York, December , 1945.

WILLIAM L. STANDARD,
Attorney for Intervening
Defendant-Appellant.

KNOWLTON DURHAM,
Attorney for Plaintiff-Appellee.

534

J. READ SMITH,
Attorney for Defendant.

535

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the said District Court in the above-entitled cause, as agreed on by the parties.

Dated, New York, December , 1945.

536

WILLIAM L. STANDARD,
Attorney for Intervening
Defendant-Appellant.

KNOWLTON DURHAM,
Attorney for Plaintiff-Appellee.

J. READ SMITH,
Attorney for Defendant.

537

Clerk's Certificate.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of record of the said District Court in the above-entitled cause, as agreed on by the parties.

539

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Eastern District of New York on the day of December in the year of our Lord one thousand nine hundred and forty-five, and the independence of the United States the one hundred and seventieth.

PERCY G. B. GILKES,
Clerk.

(Seal)

540

[fol. 181] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 196

(Argued February 5, 1946. Decided March 4, 1946)

Docket No. 20092

ABRAHAM FISHGOLD, Plaintiff-Respondent,

against

SULLIVAN DRYDOCK & REPAIR CORPORATION, Defendant; ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O., an Unincorporated Association of More than Seven Members, Intervenor-Appellant

Before L. Hand, Chase and Frank, Circuit Judges

Appeal by an intervening industrial union from the judgment of the District Court for the Eastern District of New York, awarding damages to the plaintiff against the defendant Sullivan Drydock and Repair Corporation, under § 8(c) of the Selective Training and Service Act of 1940 (§ 308(c), Title 50, Appendix, U. S. Code).

[fol. 182] M. H. Goldstein, for the Industrial Union; Knowlton Durham, for the appellee; John F. Sonnett, for the United States, as Amicus Curiae; Lee Pressman and Witt & Cammer, filed a brief for the Congress of Industrial Organizations, as Amici Curiae; Samuel J. Cohen, Frank L. Mulholland, Clarence M. Mulholland, and Williard H. McEwen and Mulholland, Robie and McEwen of Counsel, filed a brief for the Railway Labor Executives Association, as Amici Curiae.

L. HAND, Circuit Judge:

Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America appeals from a judgment awarding damages to the plaintiff for his loss of wages because of two lay-offs by his employer, the Sullivan Drydock and Repair Corporation, against which alone the action was brought. The union intervened, and charged

itself with the defence; the United States, the Railway Labor Executives Association and the Congress of Industrial Organizations have filed briefs, as *amici*. The appeal raises only the proper interpretation of subdivision (b) and (c) of § 8 of the Selective Training and Service Act of 1940, as amended in 1942 (§ 308(a) and § 308(b), Title 50, Appendix, U. S. Code, which we quote in the margin).* The facts as found by the judge were as follows:

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* "8(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

"8(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

[fol. 183] The plaintiff entered the employ of the Sullivan Drydock and Repair Corporation as a welder, on December 21, 1942, and was steadily employed as such until May 22, 1943, when he was inducted into the Army. He served until July 12, 1944, and was then honorably discharged, and received a certificate of the kind described in § 8(a). At that time he concededly was, and he has since been, qualified as a first-class welder; and the company restored him to this former position on August 21, 1944, and has never dismissed him. The controversy here at bar arises because on three occasions: viz., on April 9, April 11, and from May 17 to May 24, inclusive, it refused to give him any work, because there was not enough on those days to occupy all hands. In so refusing it preferred other welders, not veterans, who had a higher shop seniority than the plaintiff: this in accordance with the agreement between the company and the union. The plaintiff's posi-
[fol. 184] tion is that, as a veteran, § 8(b) and § 8(c) gave him priority over all his fellows except other veterans; the union's position is that those sections merely restored him to the same place in the shop hierarchy which he would have had, if he had been on leave of absence during the period of his service. The judge held with the plaintiff and the union appealed.

Subsection B of § 8(b) is the operative source of the privilege on which the plaintiff relies; it reads as follows: "Such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible to do so." "Such position" is nowhere defined except as "a position other than a temporary position, in the employ of any employer." Taking this clause by itself, it seems to us beyond debate that it was not intended that the veteran should gain in seniority. It will be observed that the grant is in the alternative: he is to be "restored" to his original position, or to one of "like seniority, status and pay," whenever possible. The phrase, "like seniority" means the "same seniority" as before; and it necessarily precludes any gain in seniority. It follows that, if the original position is no longer open, the substitute shall be a position of no greater, though no less, seniority than the lost position. But if that be true, there can be no implication that, if the original position be not lost, but be still available, the veteran shall be re-

stored to it with a gain in priority; for that would presuppose that Congress did not intend the substitute to be as nearly a complete substitute for the lost original as it was possible to make it, a hypothesis absurd on its face. Hence we must start with the proposition that subsection B of § 8(b) not only did not grant any step up in seniority, but positively denied any.

[fol. 185] Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been "on furlough or leave of absence" while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be. Having in this way declared how the veteran's interim position "shall be considered," Congress added that he should be "restored without loss of seniority." Had the purpose been, not only to insure the veteran that he should not lose any more steps upon the ladder than if he had been on leave, but also that he should go to the top, we cannot conceive that Congress would have expressed itself in the words, "without loss of seniority." They have no such express meaning, and their implications are directly the opposite; for they disclose a concern against his possible demotion inconsistent with any implied belief in his promotion. For these reasons we are satisfied that, except for the concluding phrase of subdivision (c) there can be no doubt that textually the union's construction is the right one. It remains to consider that phrase which, as we understand it, is the chief reliance of those who take the opposite view.

It declares that the veteran "shall not be discharged from such position within one year after such restoration"; and we should, so far as possible, interpret it so as not [fol. 186] to conflict with the rest of the section; in particular, so as to leave untouched the privilege of seniority, as it is earlier defined. There is no difficulty in doing so, if

"discharge" means a permanent end to the relation of employment, a separation, a dismissal; and that is indeed its ordinary meaning. For example, the Oxford Dictionary (Vol. II, p. 412, sub title "Discharge" [3), reads: "To relieve of a charge or office; (more usually) to dismiss from office, service or employment; to cashier": this in distinction with "Lay-off," (Supplement, p. 8): "A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off season." It seems to us that Congress used "discharge" in this sense: i.e., that the veteran was to be assured of his job for the same period—a year—for which he was to be drafted; but that the job to which he was "restored"—as that very word implies—was to be subject to the same conditions to which the old job had been subject with only the exception that it should be better in so far as a leave of absence for the year might improve it. The value of that assurance would indeed vary. In a closed shop it would presumably add little, for the union would not allow a member to be discharged without cause anyway. In an open shop the same would be true, if it were partly unionized, and the veteran were in the union; but, whenever for any reason he had not that protection it prevented his being turned out, so long as he behaved himself, and that was an advantage of no mean importance. We do not know what proportion of those in industry are not in unions; but their number is certainly very large, and, even though the clause was of value only to them, they are numerous enough to give it a purpose; to say [fol. 187] nothing of the possibility that statutory protection may be an important supplement to union protection.

When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly

insisted that no troops should be sent overseas. The original act limited service to one year; and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September, 1941. Congress was calling young men to the colors to give them an adequate preparation for our defence, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; but we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which § 8(b) and § 8(c) were cast.

[fol. 188] The plaintiff argues, however, that, regardless of their original scope, these sections have in any event by administrative interpretation and by later legislation, taken on the meaning which he claims. We shall consider first the administrative interpretations. Section 8(g) directs the Director of Selective Service to establish a "Personnel Division" which shall "render aid in the replacement in their former positions of and in securing positions for * * * persons who have satisfactorily completed any period of their training and service under this Act," and on March 5, 1944, the Director issued a memorandum (No. 190-A, Part IV, § 4(b)), which read: "A veteran who has been reinstated to his former position cannot be displaced by another on the ground that the latter has greater seniority rights." Section 8(c) directs the proper district attorney, "if reasonably satisfied" that a veteran "is entitled" to the benefits of the Act, to "appear and act as attorney" for him to enforce his rights; and the Attorney General, as appears from his intervention as *amicus* in this action, has read the law like the Director of Selective Service. On the other hand, the National War Labor Board adopted the opposite view in *In Re Scovill Manufacturing Co.*, 21 W. L. R. 200; as have several of its arbitrators; and the Solicitor of the Department of Labor

did the same in an instruction for the guidance of federal conciliators in dealing with war veterans (16 L. R. R. 481).

So far as we can find, these are the only interpretative rulings that have as yet appeared by officials who can be said to have been charged with any duty in administering the Act; and it can hardly be said that they have had that consistency to which we should yield our judgment. We do not forget that the canon which the plaintiff invokes is not confined to decisions *inter partes*, like those of the Federal Trade Commission, the Interstate [fol. 189] Commerce Commission, the Labor Board, or the Tax Court; it extends also to the interpretations of officials, charged with the duty of enforcing statutes. *Skidmore v. Swift*, 323 U. S. 134; *Great Northern Railway Co. v. United States*, 315 U. S. 262. Whether the weight to be given to such rulings is less than to regulations for the conduct of, or decisions in, contested cases, has never been expressly decided, though — was intimated in *Skidmore v. Swift*, *supra*, p. 139; and see Judge Frank's dissent in *Duquesne Warehouse v. Railroad Retirement Board*, 148 Fed. (2) 473, 485-487. There is indeed a basis for making such a distinction because the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative; and of this sort were the rulings of the Director and the Attorney General in the case at bar, unlike the decisions of the War Labor Board and the direction of the Solicitor of the Labor Department. Be that as it may, concededly all such considerations are only cautionary, and not authoritative; for in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means: as the Supreme Court recognized in its last word upon the subject. *Jewell Ridge Corp. v. Local*, 325 U. S. 161. We should have to be in much greater doubt than we

[fol. 190] are, if we were to yield, even to a more uniform administrative interpretation than exists here.

There remains the question whether the amendment of § 8 in December, 1944, and the extension of the whole act until May 15, 1946, is to be taken as embodying the Director's position. The amendment, taken alone, only extended the time within which a veteran might apply for reinstatement from forty days to ninety days, and made that period begin from the termination of "hospitalization continuing after discharge for a period of not more than one year," if he was in a hospital. Of itself this indicated no other change in intent; but the Director's ruling had been made for over six months in December, 1944. Moreover, Colonel Keesling, of the Director's office, in one part of his testimony before the subcommittee of the Committee on Military Affairs, stated the Director's position. His later remarks were, perhaps, somewhat ambiguous, and we are left in doubt as to the final impression which his testimony as a whole may have left on the subcommittee. After he had first mentioned the subject, the presiding chairman, Mr. Costello, wished to revert to it, and the Colonel thereupon read the Act as it stood, and a colloquy ensued which we quote in the margin.* He was then speaking of the fact that the

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*"Mr. Johnson: And the time he serves in the armed forces does not affect his seniority?

Colonel Keesling: That is right. He shall be restored without loss of seniority.

Mr. Harness: Does that mean he does not lose any of the seniority he has acquired up to the time of his induction, or that he gets that seniority that has accrued to him while he was working, plus the time he served in the Army?

Colonel Keesling: The latter is right.

Mr. Harness: Whose construction is that?

Colonel Keesling: Ours. The language is clear. It says that a person so restored shall be restored without loss of seniority.

Mr. Johnson: It is not clear that that means his former seniority.

Colonel Keesling: Would it not be loss of seniority if a nonveteran increased his seniority by 2 years without credit-

[fol. 191] veteran's absence from the shop should be counted as though he were on leave, or on furlough; and whether his hearers assumed that this was consistent with what he had said before, or supplanted it, is not entirely certain.

However, we cannot in any event assimilate the situation to that to which courts so frequently resort in aid of the interpretation of ambiguous language; i.e., reenactment without change after administrative interpretation. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492; *National Lead Co. v. United States*, 252 U. S. 140, 146; *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U. S. 269, 273. The rationale of that canon must be, either that those in charge of the amendment are familiar with existing rulings, or that they mean to incorporate them, whatever they may be. The second would hardly be tenable; we should hesitate to say that Congress might enact as law regulatory provisions with which it concededly had no acquaintance. On the other hand, if we are to suppose, in the absence of evidence to the contrary, that Congress is familiar with all existing administrative interpretations, and is content to accept them when it makes no change, it would seem that the force of that assumption should vary with the circumstances. For example, successive recensions of the Internal Revenue Act are the result of detailed conferences between the Treasury and the committees of Congress; [fol. 192] and there is good reason to assume that, in so far as the statute is not changed, existing regulations and even less formal interpretations are expressly affirmed. That may well be a proper inference in the case of all general recensions, accompanied as these ordinarily are by continuous and intimate consultation with adminis-

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ing an employee with 2 years' seniority for the 2 years he spent in the armed forces?

Mr. Johnson: It might mean without loss of what he had before.

Colonel Keesling: That is not the way we have construed it. There has not been any difference of opinion on that as far as the labor groups are concerned. The act says any person who is restored shall be restored without loss of seniority."

trative officers. But it would seem hazardous to carry such a conclusion to the situation here at bar. So far as concerns any actual information conveyed to Congress, it was at most confined to the occasion which we have discussed, for it would be gratuitous to suppose that the same information ever reached the Senate Committee of Military Affairs. That aside, the same ambiguity arises here, if we were to impute to Congress a knowledge of all administrative rulings, as arises from the rulings themselves, for the decisions of the National Labor Relations Board and of the Solicitor of the Labor Department both preceded the amendment of § 8(c). To suppose that Congress was familiar with one set of rulings and not with the other would be baseless in fact, and involve the canon in greater uncertainty than already attaches to its use, which—be it said with all deference—is by no means negligible. We should be clutching at straws and relying on phantoms, if we were to suppose that the re-enactment of this section with its very specific amendment was intended to effect so vital a change in industrial relations. Certainly we should be unwarranted in believing that Congress would have made so far reaching a change without notice to those who had an interest equal with the veterans themselves—the unions. Finally, as in the case of the effect of such rulings unaccompanied by any amendment of the statute, when all is said, the canon is only a help when the intent is otherwise in doubt; [fol. 193] and, after every allowance for the differences which have actually arisen, we cannot bring ourselves to abandon the construction we have adopted. As for judicial interpretation, this is the first appeal; and the only decisions in the district courts are apparently equally divided. *Whirls* v. *The Trailmobile Company* (D. C. S. D. Ohio), is against the view we take; *Olin Industries Inc.* v. *Barnett* (D. C. S. D. Ill.) is in accord. The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible.

We cannot conclude without expressing the hope, though it may not be realized, that our decision may not be taken as indicating any indifference to the claims of those who

stood by the nation in the hour of its need at the hazard, and so often with the loss, of all that life holds dear.

Judgment reversed; complaint dismissed.

CHASE, Circuit Judge (dissenting):

I cannot believe that § 8(b) and (c) of the Selective Service Act as amended has been given the effect intended by Congress. It has been construed to mean that an honorably discharged veteran is entitled upon timely application to be restored to his old job, such a job having, as here, continued to exist, and to keep it for a year unless discharged for cause only if his employer has not, by contract with a third party otherwise agreed. That seems to be too narrow a construction to put upon a remedial statute which ought to be interpreted liberally in favor of the veterans for whose benefit it was enacted. See *Boone* v. *Lightner*, 319 U. S. 561, 575.

[fol. 194] There is no real controversy between the appellee and his employer who took no appeal and who had previously restored to the veteran the position he had formerly held; had kept him continuously at work in it for about seven months; and would presumably have continued so to do for at least a year but for action by the intervening union. The latter which is the sole appellant insisted that it had the contractual right to have the veteran displaced whenever necessary to make room for a non-veteran union member who had been employed about a month and a half before the plaintiff had originally been hired and the employer yielded to this demand. The ability of the plaintiff to do the work is unquestioned and it is not even intimated that he gave any cause for discharge.

Thus the clear cut issue is whether Congress intended by this statute to make sure that those who were required by it to terminate their non-temporary employment and serve in the armed force should also be entitled by it to resume their former employment, or the equivalent, and keep that for a year after their honorable discharge from service, provided they were and continued to be able and willing to fill the position satisfactorily; or whether Congress merely left this appellee and others like him with nothing but the right to have their time in the armed forces

counted as time worked for their old employers as they competed with others not displaced by the statute, for their old jobs, or ones as good, according to whatever standards of competition their employers and some third party by contract saw fit to impose upon them. And if the correct construction of the statute be that Congress intended to let returned veterans try to readjust themselves as best they might with only an unimpaired "seniority status, and not, when there were such jobs, an actual job with actual pay on which they could live at least for a [fol. 195] year, I must say with all deference, that words were used which have virtually to be read out of the statute so to restrict its meaning.

Congress first provided in § 8(b) (A) and (B) of the statute for the kind of positions honorably discharged veterans should get. They should be restored (1) to their *former* positions. In providing for that seniority was not even mentioned. Then (2) in the alternative to give the equivalent to men whose former positions were non-existent, it was provided that the veteran be given a position "of like seniority, status, and pay." The words just quoted are those defining not some relative "position" in a figurative line of men available for work but a position in which the veteran could actually work. The words "a position of like seniority, status, and pay" are but the equivalent in their setting of "a job just as good with equal pay." Moreover, the definition of the alternative position plays no proper part in this case anyway since the appellee was restored to his old position and I mention it only because it seems to have been relied on as some justification for construing § 8(c) as the majority has done. It is there that the decisive provision is found.

After having made it plain in § 8(b) that the veteran should get his old job back or be offered one as good, Congress next in § 8(c) made equally clear in plain language that certain privileges went with the job. They are of two kinds. The first is that the position carries with it the right of the former employee thus re-employed to be treated as though he had been "on furlough or leave of absence during his period of training and service in the land or naval forces" and accordingly he shall suffer no "loss of seniority, (and) shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on

[fol. 196] furlough or leave of absence with the employer at the time such person was inducted into such forces. * * * *" Thus far the returned veteran is given but the status of an employee who has been furloughed or given a leave of absence without actual termination of employment and I agree that his insurance or other like beneficial status is to be determined under the rules and regulations applicable thereto when he was inducted and that for this purpose the statute requires it to be done on the basis of no loss of his seniority while away. Yet only in that respect was seniority made to count and then only negatively in that no loss should be suffered by any relative diminution of it because of absence. Then Congress, not content to provide that much and no more, in § 8(c), also gave the veteran another and different kind of privilege which was not made dependent in any way upon his seniority status as an employee or upon his rights as such an employee on furlough or on leave of absence. It is an added and independent right conferred in clear and plain words which people who want to express their thought unmistakably customarily use. They are "and shall not be discharged from such position without cause within one year after such restoration." Unless these words mean that after an honorably discharged veteran has been given the position to which he is entitled under the statute he may keep at work in it for a year provided there is such work to be done and he gives no cause for his discharge, I submit they mean nothing.

Congress was here prohibiting not merely discharge from employment but discharge from "such position." It did not leave the employer free, to "lay-off" the re-employed veteran at will, or to shift him from one position to another not as good, or otherwise deprive him of the particular kind of work and pay to which he had been "restored." It gave the veteran a year of security in this position be- [fol. 197] fore he could be ousted from it simply because someone had a contract with the employer which, but for the statute, gave him a senior right to it. To deny the veteran the right to work in that position during the year is a "discharge" from it for the period of his deprivation and calling such action a "lay-off" or anything else one may choose for a name neither alters the fact nor justifies the action. Such a choice of labels is simply what should be recognized as a futile attempt to circumvent the statute.

Moreover, if this to me seemingly plain and simple language may fairly be said to have had at first some ambiguity lurking in it, the interpretation of it by the Director of Selective Service should be enough to clear that up for present purposes. It was made by the Director in performing the duties the statute required him to perform and though not of course binding upon the courts it is entitled to the same respect that is now customarily given like interpretations of statutes by other administrative officers acting in the performance of their duty. That interpretation alone would be most persuasive for it was at least a reasonable one. *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572; *Great Northern Railway Co.* v. *United States*, 315 U. S. 262; *Baze* v. *Scott*, Cir. 10, 106 F. (2) 365. But it doesn't stand alone. After it was well and widely known that it had been made Congress by the re-enactment of § 8(c) without change gave potent evidence in addition to the words themselves that it meant what it said in § 8(c) when it said that "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) * * * shall not be discharged from such position without cause within one year after such restoration." See *United States* v. *Midwest* [fol. 198] *Oil Co.*, 236 U. S. 459; *McCaughn* v. *Hershey Choc. Co.*, 283 U. S. 488; *National Lead Co.* v. *United States*, 252 U. S. 140; *Mass. Mut. Life Ins. Co.* v. *United States*, 288 U. S. 269.

Undoubtedly Congress could by statute override private contracts between employers and employees or those acting for them. It did so when under the Selective Service Act men holding positions of employment were inducted. It could, as it did, displace others later whenever necessary to make room for veterans qualified for and seeking their old positions.

And finally Congress passed this statute for the benefit alike of all honorably discharged veterans who had been taken from employment more stable than what is called temporary. There is no discernible purpose not to treat them all the same and no good reason why Congress should not have intended to make a man who was inducted from a closed shop as secure in his job during the first year after his return as a man inducted from an open shop would be. One as much as the other would need this ad-

justment period before facing the full brunt of competition for his job. I think Congress has by word and act well demonstrated its purpose to provide for equality of treatment in this respect, regardless of private contracts made by any employer with anybody.

I dissent.

[fol. 199] United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of March, one thousand nine hundred and forty six.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

Abraham Fishgold, Plaintiff-Appellee,

v.

Sullivan Drydock & Repair Corp., Defendant; Roy Granata, etc., et al., Intervenor-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs; complaint dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 200] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Abraham Fishgold v. Sullivan Drydock & Repair Corp. et al. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1946. Alexander M. Bell, Clerk.

[fol. 201] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 202] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 1, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The Solicitor General is requested to file a brief *amicus curiae*.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Supreme Court, U. S.
FILED
MAR 19 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION, ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

KNOWLTON DURHAM,
Counsel for Petitioner.